IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 175.

ROBERT J. FLEMING, JOHN A. FLEMING, STANHOPE FLEMING, ET AL., ETC., ET AL.,
PLAINTIFFS IN ERROR.

VS.

ANNA B. FLEMING.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF FOR APPELLANT.

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STATEMENT OF THE CASE.

This is writ of error to the Supreme Court of the State of Iowa. The questions involved are, (a) Whether that court erred in holding that despite three writings entered into by defendants (now plaintiffs in error) with their deceased brother Charles, his widow, the defendant in error, has the same right of dower that she would have had if said writings had not been made; (b) Whether a federal question is raised by said holding of said court.

As to said writings—

In view of certain declarations made in the opinions of the Supreme Court of Iowa in which the court fluctuates between [illegible] that the three writings taken together control and also saying that the third writing controls, the fluctuations between holding that nomenclature is not material and again holding that it is; holding it to be material on the validity of a survivorship contract that it was made by those alleged to sustain the relation of partners; in view of the fact that the court finds what was not found in the trial court, to-wit, that a partnership existed, which finding is contrary to the undisputed testimony; in view of the fact that importance is attached to the claim that no joint tenancy can exist as to a commercial enterprise and overlooking that whether this be so or not the contracts here do not deal with a commercial enterprise but with the disposition of personal property accumulated in conducting such enterprise; in view of the fact that it is asserted a joint tenancy can exist only as to lands; and in view of the fact it is overlooked that there can be a valid survivorship contract even if the cutting off of inheritable interest is not effected through being an incident of a joint tenancy—we proceed to set out an analysis of the three writings perhaps more fully than is in strictness necessary, where, as here, the matters just referred to must and will have detailed attention in course of the argument.

The first contract stipulates that the signers

"Shall have only such share and interest in the profits, earnings and income of the business of Life Insurance in which the signers are or shall be jointly engaged, as shall be actually received by each or paid upon the order of each with the consent of the others, from the income of said Business." (Tr. 4.)

"And any amount so paid shall fully represent the share and interest of each at any time while the undersigned shall be associated together in said business or thereafter." (Tr. 4.)

"And any sum of money paid to any party hereto shall be in full of the interest of said party in said business." (Tr. 4.)

The second contract provides

"That each party shall have only such share and interest in the profits, etc. * * * as shall be actually received by each, or shall be paid upon the order of each with the consent of the others from the general funds or income of said business." (Tr. 5.)

"Each of the parties to this agreement has and hereafter shall have only such share of and interest in the profits, etc. * * * of all contracts of insurance, etc. * * * in which we are now or any of us shall hereafter be jointly engaged." (Tr. 5.)

"And any sum or amount so paid shall fully represent the share and interest of each of the partners hereto at any time while any of the undersigned shall be associated together in said business or thereafter." (Tr. 5.)

The third contract provides

"And what said decedent has heretofore withdrawn from said partnership shall constitute his sole and entire interest therein and the sole and entire interest of his estate therein." (Tr. 6.)

The second agreement stipulates that it is made on the consideration

"Of the services of each of us rendered or hereafter to be rendered in the business of Life Insurance, of the income to be derived therefrom and of the mutual stipulations herein contained." (Tr. 5.)

The third contract provides

"That the partnership between the undersigned is with the express and distinct understanding and agree-

ment that all property heretofore acquired by the undersigned has been acquired as the results of said partnership and that said property now belongs to said partnership." (Tr. 6.)

The first contract provides that it is made

"To fix and determine the interest of each therein." (Tr. 4.)

The second contract says that it is made for one thing

"To more effectually define and determine our individual interest in said business in the future (Tr. 4), as between ourselves and in relation to all other persons." (Tr. 5.)

The first contract provides

"And it is distinctly understood and agreed between the parties that (neither) they nor any of them have or can have any property rights or money interest in said business other than hereinafter specified." (Tr. 4.)

The second contract concludes

"It being the intention of all the parties * * * and they hereby declare that (neither) they nor any of them have or can have any property rights or money interests in said business other than that herein specified and defined so long as any of them shall be associated together in the business of Life Insurance." (Tr. 5.)

The first contract provides

"And at no time shall any accounting be made or required to be made by any party hereto, his representatives, etc. * * * upon any basis of labor performed or money received on account of said business by any of the parties hereto or otherwise." (Tr. 4.)

The second contract provides

"And that at no time shall any accounting be made or required to be made by any person or any party hereto or their heirs, survivors, etc." (Tr. 5.)

The third agreement provides

"That the signers own the stock of Fleming Brothers, Incorporated; also real estate and other property in which each of them are interested—and that the contract is made because the signers expect to acquire additional property.

"And that it is made because said property now held and owned has been acquired and owned with the understanding that it shall be disposed of as is later provided in this contract." (Tr. 6.)

"This contract covers not only the property now owned but also property hereafter acquired; and all hereafter acquired property * * * whether standing in the names of said individuals or either of them or in the firm name is understood to be firm property unless there be express agreement to the contrary." (Tr. 7.)

The first contract provides

"Upon the death or withdrawal of any party hereto all his interest in said business shall thereupon cease and determine." (Tr. 4.)

The second contract provides

"It is further agreed that upon the death or withdrawal of any party hereto all his interest in said business and in the assets thereof shall thereupon cease and determine." (Tr. 5.)

The third contract provides

"That upon the death of either one of the undersigned the property then owned by the said partnership including all property standing in the names of the individual partners * * * shall be and become the property of the surviving brothers of the said partnership." (Tr. 6.)

This branch of the case presents, speaking in a general way, the following complaints:

1. That the Supreme Court of Iowa seems of opinion that the mutual obligations in these writings do not import a consideration sufficient to sustain the contract

made in the writings; that somehow or other there is at least a partial failure of consideration because some of the mutual promises are asserted to be such as it is impossible to perform—this, though no partial failure of consideration is pleaded.

2. The court seems to require for the sustaining of a survivorship agreement that each contributor to the joint venture must vest such title as he has or ultimately may have in each of the other parties to the contract, and that it is an insufficient disseizin and vesting to vest no title except that the last survivor shall have complete title of what property exists when he becomes such last survivor. And as it is the very essence of survivorship contracts that no one shall be vested with complete title until there is a last survivor, and as that is always the state of the title in such agreements, every decision that ever sustained a survivorship contract, therefore, erred.

3. To carry this to its logical conclusion the court held that when the property of those who are parties to such an agreement is by them surrendered to a corporation, that though the court asserts it looks to substance rather than to form, such change in evidencing the property owned avoids the survivorship agreement. It couples this with the argument that the shares of the corporation were never delivered at all, and with the further claim that the non-delivered shares effected a destruction of the survivorship contract, and this, though those very shares were made out and endorsed by each to the one who should be the last survivor.

4. It declares that the rights of the parties are after all to be measured by their contract and depend upon that contract, and also that the parties to it shall not have what the contract gives.

5. It makes fraud upon marital rights one argument, when in view of the contract between the parties Charles never had any property, since he died too soon—and thus is asserted a fraud upon rights that never came into existence.

6. It holds there can be no joint tenancy with the incident of survivorship, in a commercial enterprise. This, though the contracts do not attempt to create such tenancy in such an enterprise but deal only with ultimate title to the savings that may in future be made in conducting a commercial enterprise.

7. It advances the proposition that there may not be a joint tenancy except as to lands—a position contrary to all authority.

8. Its argument seems to take the position that the agreements at bar did create a joint tenancy and also that they did not—and it stresses the immaterial claim that such tenancies are no longer such favorites of the law as they once were, overlooking that its own decisions declare that the laws of Iowa still sanction such tenancies.

9. It overlooks its own declaration in the instant case that survivorship is only an incident in joint tenancy, and so ignores that there can be an effective survivorship contract even if there be no joint tenancy.

10. It holds against all authority that the members of a partnership cannot make a survivorship contract, and especially overlooks that there is no law against making such a contract as a condition to entering into the partnership relation at all.

11. Not only does it make the untenable claim that such agreement may not be made a condition upon which

the partnership relation will be entered, but it asserts against all the undisputed testimony that a partnership existed.

12. It rests this claim mainly upon the fact that in the third writing the words partner and partnership are used, although elsewhere it declares that nomenclature cannot create a partnership.

13. It concedes there is no express provision to share profits and losses, but finds that this essential element to a partnerhip relation is made by implication in these writings, though they say nothing about either profit or loss, but simply provide that each may draw what he needs (which means if it existed to be drawn) and that the last survivor shall take what remains (of course, if anything does remain).

14. It declares that the intent of the parties is to be found from what the three writings have and also that the third writing controls—which last position seems to be based wholly on the fact that the last uses such words as partnership—once more holding in one place that nomenclature is immaterial and in another that it is controlling.

15. It makes a distinction as to survivorship agreements made between husband and wife and holds that while such cuts off heirs, it does not cut off dower—overlooking that it cannot matter who makes such contract, for in that if such contract does cut off rights of inheritance it also cuts off dower. First, because both dower and the rights of heirs are the creature of statute and, second, if such contract works that the one who dies first dies seized of nothing, there can be no dower in what he did not leave, and that this is so whether it be a wife or an heir that attacks the contract.

16. The court departs from the rule heretofore always declared by it, to-wit, that as to personal property either spouse may dispose of same as he sees fit—and holds that personal property may not be disposed of by a survivorship contract.

17. It uses the fact that a testament cannot cut off dower by thrusting a testament upon these plaintiffs in error. It does this by saying that these contracts are nothing but the equivalent of an agreement to make a will. That such an agreement being broken creates the same situation as if it had not been broken and the promised will had been made—and that, therefore, what these plaintiffs in error are attempting to do is to cut off dower by asserting a testament. It is all an argument based upon a contract to make a will which in this case was never made, and upon holding that this contract or anything else which is not a duly executed will can ever be a will. And overlooks that if what is said in the opinion is true of this contract it was true in every survivorship agreement—which would make it difficult to understand how such an agreement was ever sustained by a court.

18. The instant decision is a mere oscillation. No reported case supports its pronouncement. And every case in the Supreme Court of Iowa before the instant one and every case since the instant one was rendered are opposed to the opinion now in review.

19. The decision now here is contrary to the decision of this court in *Mayburry* v. *Brien*, 15 Peters 21.

As to the jurisdiction of this court.

A Federal question is raised because the instant decision is a departure from the Iowa law as it stood at and

before these writings were entered into; and it is such a departure also from the construction of Iowa statutes, which statutes were in effect at and before these contracts were made, as that this departure in interpretation raises a federal question. This is especially so because of an Act to amend Section 237, Judicial Code, approved February 17, 1922. There is a Federal question, too, because the Supreme Court of Iowa gave the question when presented such consideration as that such question must now be considered here. (Tr. 130.)

SPECIFICATIONS OF ERROR.

I.

The Supreme Court of Iowa erred in holding that the three writings entered into by and between these three plaintiffs in error and their now deceased brother Charles, were ineffective to prevent plaintiff in error from asserting dower rights in an alleged estate which, it is alleged by her, her husband died seized of—. In other words, it erred in holding that an express agreement providing for survivorship in the accumulations in a business yet to be engaged in was not a valid contract. All contrary to the decision of this court in *Mayburry* v. *Brien*, 15 Peters, 20—and decisions without number.

II.

The court erred in declining to hold that the settled case law of the State of Iowa and the settled construction of its statutes as these existed at and before the time these contracts were made did oblige it to declare that the plaintiff in error had no dower rights, in that her husband died seized of nothing to which dower could attach. —And in holding instead that the decedent died seized of an estate to which dower could attach.

III.

The decision of the Supreme Court of Iowa now in review impairs the obligations of said contracts and is violative of the Constitution of the United States and of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

IV.

Said decision is contrary to the line of cases decided in this court of which the Muhlker case is perhaps the leading one.

GRAND DIVISION ONE.

THE SUPREME COURT OF IOWA ERRED IN ITS HOLDING THAT THE CONTRACTS AT BAR WERE NOT EFFECTIVE AS SURVIVORSHIP AGREEMENTS AND DID NOT HAVE THE EFFECT OF BARRING PLAINTIFF IN ERROR FROM ASSERTING DOWER IN A CASE WHERE WHEN HER HUSBAND DIED HE LEFT NO INHERITABLE ESTATE, BECAUSE HE HAD ENTERED INTO SAID AGREEMENT.

PART 1-A.

The court indulged in construing the writings, though they need no interpretation, and this needless construing was also erroneous construction.

We submit the court had nothing to construe, that the writings are perfectly plain, and that the only question is what is the legal effect of that which the writings clearly express. The first one says that it is made "in order to provide for the future uninterrupted prosecution of the business of Life Insurance in which we are now or may hereafter be engaged and mutually associated and to fix and determine the interest of each therein * * * upon the death or withdrawal of any party hereto all his interest in said business shall cease and determine." (Tr. 4, 5.)

The second recites that in view of how their business has been transacted, this contract is made "to more effectively define and determine our indiviual interest in the said business in the future."

The third recites that whereas each signer is owner of one-fourth of the stock of a named corporation, and also the owner of real estate and other property in which each of them are interested, that they expect hereafter to acquire additional property and whereas said property held

and owned by them has been acquired by them with the understanding that it shall be disposed of as hereinafter set out. Therefore, "the partnership between the undersigned is with the express and distinct understanding and agreement that all property heretofore acquired by the undersigned has been acquired as results of the partnership and now belongs to said partnership * * * that upon the death of either one of the undersigned the property then owned by the said partnership including all property standing in the names of the individual partners including stock in said corporation, shall be and become the property of the surviving brothers of said partnership * * * this contract covers not only the property now owned but also property hereafter acquired * * * and it, either standing in the name of an individual or in any of them or in the firm name, is understood to be firm property, unless there be express agreement to the contrary. (Tr. 6, 7.)

Up to this point there was nothing to construe. Each and all the writings create a survivorship and cut off inheritable interest. The court agrees that "the second contract though changed in wording expresses practically the same thought with the added purpose to transfer to the entity, whatever it is, all rights of Robert J. under his contract with the Mutual Life Insurance Company of New York (Tr. 96). While it is true, some of the later writings express the idea that the makers deem it necessary to clarify the earlier one or ones, neither needed clarifying or were clarified, and no material change in an earlier one was worked by any later writing. It seems to have been the common case of doing much needless writing and yet leaving all that was written too clear to need the interpretation of a court. The State District Court declared there was no need of interpretation for it said:

"Considering the terms of the agreements, it is clear they were made with an intent to establish a joint ownership of the property acquired by the brothers, with a right of survivorship upon the death of a brother in the surviving brothers or brother. Such intent and purpose appear in every contract. * * * The intent of the parties to the instrument set out above is clearly to create an estate with the incident of survivorship." (Tr. 55).

The District Court, too, went on the tangent that the third writing was in a way the controlling one. For it says:

"Be whatever the intent or purpose of the first two agreements, the last agreement is determinative of the rights of the parties involved, inasmuch as that agreement is the one in force when Charles Fleming died, and is the present working agreement of the partnership; therefore, upon the construction of that agreement must the rights and interest of the parties be determined." (Tr. 55, 56).

The fallacy is the treating the third agreement as a substitution instead of a supplement. It was no more in force when Charles died than were the other two writings. But, as said, the Supreme Court took similar grounds:

In this third instrument the parties to the first two have undertaken to define the relationship existing between them and to more clearly state the relation they sustained to the property and to define more clearly what they meant when they said in the first two contracts, "in order to provide for the future uninterrupted prosecution of the business of Life Insurance in which we are now or may be hereafter engaged and mutually associated." (Tr. 92.)

This last instrument is the last expression of these parties touching the subject matter of all three contracts and they themselves therein state in words that have definite and legal signification what they understood the relation was under which they operated. (Tr. 92.)

This last instrument is the last expression of these parties touching the subject-matter of all three contracts. and they themselves therein state in words definite and significant what they understood the relationship was under which they were operating.

As the third writing is the last expression of the minds of all these parties touching their relationship to each other and to the property, it might well be considered the controlling expression, determinative of their relationship and their rights in and to the property at the time Charles died. (Tr. 93.)

Within the cover of these writings must be found all that these men had in mind touching their personal relationship and their relationship to, and interest in, the property accumulated by the joint efforts. (Tr. 93.)

We look to what is written in the three instruments, taken as one instrument, to find the thought that lies back of the writing, the purpose and intent of the parties in the making of the writing, and to find the legal status that the writings create. (Tr. 92.)

That these parties had a purpose and an intent to accomplish something touching their rights, duties, and obligations to each other in the making of the instruments and a purpose to fix the rights of each in the property accumulated and to be accumulated, must be assumed.

Within these instruments the height, depth, width and length of that purpose must be found. (Tr. 92, 93.)

We submit the last is not more controlling than the first and that the proper analysis is made clear in the opinion of the court where it declares:

"What they have said in these contracts and what they had done in execution * * * is the only expression of their thought and purpose to which our minds are directed. These writings considered together show the mutual understanding and purpose of the parties."

There is not only needless interpretation but erroneous interpretation as well.

In the first contract it is provided:

"That each of the parties to this stipulation and agreement shall have only such share of and interest in the profits, earnings and income of the business of life insurance in which we are or shall be jointly engaged, as shall be actually received by either, or paid upon the order of either, with the consent of the others, from the income of said business. And such amount so paid shall fully represent the share and interest of each of the parties hereto at any time while we the undersigned shall be associated together in said business or thereafter. Upon the death or withdrawal of any party hereto, all his interest in said business shall thereupon cease and determine (and there is to be no accounting) * * * And it is distinctly understood and agreed between the parties hereto that (neither) they or any of them have or can have any property rights or money interest in said business other than that herein specified and defined, and any sum of money paid to or for any party hereto shall be in full of the interest of said party in said business." (4)

The second agreement repeats and also adds:

"Each of the parties to this agreement has and hereafter shall have only such share of and interest in the profits, earnings and renewals due or to become due under any and all contracts of insurance or commissions thereon to whomsoever nominally payable in the business of life insurance in which we are now or any of us shall hereafter be jointly engaged, as shall be actually received by each or shall be paid upon the order of each with the consent of the others, from the general funds or income of said business; and any sum or amount so paid shall fully represent the share and interest of each of the parties hereto at any time while any of the undersigned shall be associated together in said business or thereafter. It is further agreed that upon the death or withdrawal of any party hereto all his interest in said business and in the assets thereof shall thereupon cease and determine (and no accounting is to be made) * * * It being the intention of all the parties to this agreement and they hereby declare, that they nor any of them have or can

have any property rights or money interest in said business other than that herein specified and defined so long as any of them shall be associated together in the business of life insurance." (5)

In the third writing it is stipulated that upon the death of either one of the undersigned the property then owned by the said partnership, including all property standing in the names of the individual partners which embraces said stock in Fleming Bros. Incorporated, shall be and become the property of the surviving brothers of said partnership; and that what said decedent has theretofore withdrawn from said partnership shall constitute his sole and entire interest therein, and the sole and entire interest of his estate therein. (6)

It would seem to be too plain for argument that this is a survivorship agreement covenant and that the death of one terminates his right and interest; and there is no vesting until there is a last survivor, and that therefore the one who dies first has no interest except to the extent of what he has drawn while living. Despite this clear language and unescapable reasoning the court has misinterpreted the clauses we have just set out.

It declares that these plain words do not mean what they say and what in reason they must mean. The court says: "The thought of the parties could not have been that the title to the property acquired as it came into existence should vest in no one, except the portion taken and appropriated by each to his immediate needs. (93)— And

"Analyzing these writings we find * * * that each had so long as he lived a right to use a portion of the income and profits of the business in which they were so mutually associated; that whatever his needs required, and to that extent only, he had a right to take from the earnings and income of the business such sum as he needed, upon the order or with the consent of the others.

This provision was intended to cover the immediate needs of each of the parties so associated and engaged in the business." (95)

This does more than ride over the plainest of words. It violates reason. There is express provision that what he so draws is all he shall have and that all other interests die at his death, which means, of course, that as his interest ceases when he dies, and he can draw no more after that, that his interest is restricted to what he will draw while living. Despite this, the court next says:

"Its purpose evidently was to forestall any extravagant tendency on the part of any of the brothers and to conserve the interest and profits of the business to the end that the business might not suffer from extravagance and be continuously interrupted."

To say that when one of these parties took from the profits of the concern any sum of money, however small, to meet his immediate needs, the same when taken would measure his interest in all the accumulations of the past years, could not have been intended to be literally construed.

If the parties were in fact and law joint tenants, then each had a right to enjoy the income of the estate and the fact that one of the tenants appropriated a portion of the income to his own use could not have the effect of destroying his interest in the subject matter of the tenancy. The idea of joint tenancy is that each tenant has a right to an equal enjoyment of the thing which is the subject matter of the tenancy.

If the receiving of any portion of the income or profits of the estate had the effect of destroying the interest of each in the subject matter of the tenancy, then upon the appropriation of any of the profits by the tenants or any of them, the joint tenancy would cease.

The provision of the contract above referred to (95) must have been intended as limiting the right to enjoy the income and profits of the business and not to take away his right in the subject matter of the tenancy. His right to

take was measured by his needs. What he took was a declaration by the taking of his then needs, and measured his right at that time to take to his personal use the income and profits.

It does not mean that it measured or could measure his interest in the property accumulated by the joint efforts of the parties, or that the sum of money received determined his interest in the property." (96)

In fewer words, when two or more agree that whoever dies first leaves all that remains to the last survivor, that all interest shall terminate at death, that the only interest ever possessed shall be what he draws in his lifetime—notwithstanding, what he so draws does not measure his interest. In other words, under his agreement, by dying first, he never gets an interest in the *corpus*, but the contract (without accounting) lets his estate keep whatsoever he has drawn in his lifetime. After death he can draw no more—yet, somehow, though he die first, and in the teeth of an express stipulation to the contrary, his estate does have an interest in the *corpus* beyond the amount that the decedent drew in his lifetime.

PART 1-B.

The inevitable followed. The erroneous interpretation led to disregard of what is correctly affirmed—led to correct statement of issue and of vital propositions, and not giving effect to either.

For illustration—It is recognized that the rights of plaintiffs in error depend upon the contracts—that it is all a question of contract. But the rights the contracts give are denied. The true issue is perceived, but is departed from. The court says rightly.

Assuming for the purpose of this discussion that a joint tenancy may be thus created, it would be nevertheless a status created by the "contract" of the parties and not otherwise.

Whatever the rights thus created, they must be determined in obedience to the contract and to nothing else. In the last analysis therefore we have before us a "contract," nothing more, nothing less.

Being a contract, it may be enforced as such unless there be some legal impediment thereto. (Tr. 113.)

"Here the issues are narrowed to the ascertainment of whether or not plaintiff's husband Charles died seized or possessed of any interest in the property held by these defendants or some of them. If it be determined he had an interest in the property at the time he died then she is entitled to a distributive share therein and her claim must be recognized and enforced * * * the determination of the question here involves only the proper construction of the three writings on which defendants rely to defeat her claim, to which specific reference will be made hereafter."

It is the claim of the defendants that all the property in controversy prior to and at the time of Charles' death was held by these four parties as joint tenants to which the right of survivorship attached; that upon the death of Charles all his interest in the property ceased, and this by virtue of the terms of certain written instruments under which the business was conducted and the property acquired and held at the time Charles died." (Tr. 89).

The trouble is that, as will presently appear, the contract is not obeyed, and the correctly stated issue is lost sight of or erroneously disposed of. There is an elaborate and correct statement of what is a joint tenancy, and that it cuts off inheritable interest. (Tr. 94, 95, 99). But little attention is paid to whether the contracts here create such tenancy. As will presently appear, about all that is done is assigning unsound reasons for asserting that here there is no joint tenancy. The court recognizes that survivorship rights are but an incident to joint tenancy. But elaborately argues that a survivorship right is the gist of such

tenancy, and that nothing but a joint tenancy can cut off inheritable interest (Tr. 113). It stresses the immaterial claim that joint tenancies are not as much in favor in other states as they once were—and pays no attention to its own decisions that such tenancies are sanctioned—see *Wood* v. *Logue*, 167 Iowa, 436, in which this is held, and also that neither law nor equity stand in the way of making a survivorship contract. It adds the intent was the granting of a unity of title with right of survivorship, and that the grantor had a right to prefer such an arrangement to "a tenancy in common with the ordinary incidents to such an estate"; that nomenclature is quite immaterial, that the thing created, whatever its right name, was a joint tenancy which cut off inheritable interest, and created a survivorship. And—

"Laying aside the question as to what name or designation we shall apply to the transaction between the grantor and grantees, what good reason can be assigned in law or equity for the courts refusing to give it effect according to its clear intent." (Tr. 106.)

About as much as this can be rightly claimed, for *Baker* v. *Syfritt*, 147 Iowa, 49, 62.

Pronouncements that have the support of all authority, including the Supreme Court of the United States.

They are denied nowhere save in the decision now in review.

PART 1-C.

What it all comes to is that the contracts at bar are construed away, are made the subject of untenable attack and are arbitrarily held for naught.

It is by this method that the court reaches the conclusion that dower right is impregnable against any con-

tract. And yet the contract here is one as to which it is everywhere held that it stands in the way of that right. Let there be, or not be, a joint tenancy. This contract exists and is as effective against dower or distributive share as the court concedes a joint tenancy to be.

The case seems to be disposed of by a holding that "a consideration of all these instruments shows that they were not understood as creating a joint tenancy." (Tr. 100).

We challenge this pronouncement and submit the evidence shows that the understanding was that a joint tenancy had been created. But whether this be so or not it is beyond all question, and the writings show on their face, that an agreement cutting off inheritable interest and expressly giving title to the last survivor was made and was intended to be made.

Robert J. testifies "the arrangement was that we all work together, and we had what we wanted to live on when we had it, and we pooled the whole thing, that when I should die all three would have it, and when the next one would die the others would have it, and so on until the last Fleming would have it all." (Tr. 44.)

But whether the agreement shall be named one that creates a joint tenancy is mere matter of nomenclature. The vital question is whether it provides for survivorship and the vesting of title in the last survivor. That it does this is beyond debate. And it being the fact that such survivorship agreement was made, that is the controlling thing and where, as here, it is made, there is no inheritable interest in the widow of Charles. She has no dower rights.

We submit it is elementary that while survivorship is an incident to joint tenancy still survivorship may be created effectively by contract—that indeed, the Supreme Court of Iowa does not seriously challenge this proposi-

tion. Whether it does or does not, it is not the law that survivorship exists *only* as an incident to joint tenancy. tract. Though there be no joint tenancy, under the contract here, there was nothing to transfer. The one who died first did not thereby give any estate. Under the contract, his dying first worked that Charles never obtained an estate—to again use the words of the court, his death caused him to fall away from the estate. His widow could not have dower until he died. And under his contract, when he died, and died first, he never had an estate, wherefore no dower could attach. (Mayburry, 15 Peters, 21.) Of this, more in another connection.

It is a permissible agreement that the future rights of the parties shall be based on the fact of survivorship, 17 Am. & Eng. Ency. Law, p. 65; that there may be lawful stipulation as to what at the death of all but one should be done with the accumulations the parties were then engaged in creating. The text above set forth is based on the auhority of *Taylor* v. *Smith*, 116 N. C. 531; 21 S. E. 202; *Pritchard* v. *Walker*, 22 Ill., App. 286; *Jones* v. *Cable*, 114 Pa., 586, 7. These decisions hold that the fact that survivorship is no longer regarded as an incident of joint tenancy does not invalidate contracts which definitely provide that future rights of contracting parties shall be based on the fact of survivorship. And

"Although the right of survivorship as an incident to joint tenancy be abolished by statute it may nevertheless be given by will or deed, either expressly or by necessary implication, and such a statute does not prohibit contracts that make the rights of the parties dependent upon survivorship."

As to fraud on marital right (Tr. 94) how could there be any. To be sure, the contract was made after the plaintiff had married Charles. But it is not claimed that

he had any interest in any property, at that time. At any rate, if he had personal property then, he could, as said, dispose of it at pleasure, including doing so by survivorship agreement. This record certainly fails to show that he had any interest in land at the time he signed this agreement. It all comes to just this. Charles signed this agreement which dealt with nothing but his chances of sometime accumulating personal property or lands bought with personal property, provided he was the last survivor. Certainly, plaintiff had no marital rights in this possibility at the time this contract created it. Charles then and there disposed of any personal property he might have in case he would not die too soon. In that contingency, no one possessed any marital right—so no marital right was subjected to any fraud.

PART 1-D.

There was no partnership, but it does not matter if there was. It may be made a condition to assuming that relation that all that the partnership may accumulate shall vest in the last survivor, and that he alone shall possess an inheritable estate.

In holding that the alleged existence of partnership prevented the treating of these plaintiffs in error as being joint tenants and the cutting off all inheritable interest, the court departed from *Paige* v. *Paige*, 71 Iowa, 318. And there was also a departure from the earlier construction of Section 2923 of the Code of 1897, involved in the Paige case.

The decision exhibits a departure from earlier construction of statutes and from decisions made earlier than the time at which these contracts were created, such change is retroactive, and, thereby, destroys the validity of

these contracts which were valid under said earlier constructions and decisions.

There was also such departure in construction of Section 2923 of the Code of 1897, as is proved by the decision in *Wood* v. *Logue*, 167 Iowa, 441, which holds said statute to sanction and validate such contracts as the ones at bar —and said statute provision became effective in 1860, and is still effective—and such construction holds not what the statute construed meant on the day it was construed, but what it meant from and after the day it took effect.

There was also a like departure from the construction of said statute made in *Hoffman* v. *Stiger*, 28 Iowa, 302, a decision much earlier than the dates of these contracts.

It never was the law that the partnership relation barred the making of a valid contract creating a survivorship.

In *Stewart* v. *Todd*, 90 Iowa, 283, there was an agreement to become partners. The partnership was thereupon formed on condition in the contract that the survivor "'have all property left or owned by either party or in the firm name"—and the survivorship agreement was sustained. Which means of necessity that there can be agreements dealing with the partnership relation which work a survivorship, and that the one dying first dies seized of no interest in the partnership property.

In *McKinnon* v. *McKinnon* 56 Fed., 409, (C. C. A) it is held, that where an uncle and nephew entered into articles of partnership to practice medicine, a provision in the partnership agreement that "in the event of death of the senior member of the firm all his property, personal and otherwise, which he held in partnership at the time of his death, shall go to the junior partner,—such contract should be enforced.

We submit that nothing in the law prevents the creating of a joint tenancy with its incident of survivorship, and on part of a partnership. So far as there is a rule on the subject, none are excluded from creating such a tenancy except "bodies politic or corporations." 23 Cyc. 484, point 3.

This stamps one major holding of the court as being irrelevant. It is immaterial whether or not here was a partnership. What the situation might be if the last surviving member of a partnership sought to assert the cutting off of inheritable estate in a deceased partner on a claim that the alleged partnership was a joint tenancy, and not a partnership, and that therefore, he was entitled to the incident of a joint tenancy—survivorship—is not in this case. Whether there can or can not be a joint tenancy; whether or not these plaintiffs in error are or are not partners; whether or not the four in their lifetime were or were not partners; whether the surviving brothers can have survivorship by claim to be joint tenants—is all immaterial.

The question is, whether four men, even if they became members of a partnership, are barred from making a survivorship agreement. What law exists which prescibes that men, who are free to enter a partnership or not to enter it, may not attach conditions to assuming the relation of partners. What law prevents each of them from insisting that before they will assume a partnership relation they will guard against the interruption made by death; and as a means to that end contract that as to what the partnership may hereafter accumulate the last surviving member shall take all that remains of the partnership property. It is not always true that when one partner dies his legal representative becomes vested with whatever interest decedent had in the partnership; nor that

his wife has a distributive share. That all depends. It does not follow as to any estate the partner had in his lifetime. But not as to an estate acquired by a partnership which was formed on condition that there should be no inheritable interest. When that is the agreement, the partner leaves no inheritable estate in the partnership property because, dying first, he but falls away from owning such property—because he dies too soon.

Of course, no such agreement could cut off dower rights as to any property owned by either partner at the time when such an agreement was made. And if the partnership accumulated property before a survivorship agreement was made, such agreement would not cut off dower. But the question is what law prevents those who are not yet partners from making it a condition of creating the partnership that as to property not yet owned by either member, or by the proposed partnership, inheritable interest shall be cut off.

PART 1-E.

If the fact that the agreement was conditioned there should be a partnership only if survivorship was first created, were material, the evidence does not justify the finding that there ever was a partnership.

The question of whether a partnership ever existed was made an issue in the pleadings. (Tr. 2, 3, 9). The trial Court made no finding on that issue but the Supreme Court of Iowa asserts that a partnership existed. It finds this by interpreting the three writings that the four brothers entered into. (Tr. 100). It is ruled, rightly enough, that the failure in the first two writings to name the arrangement a partnership is not fatal, and that the failure so to name is not material where the agreement contains all the ar-

rangements necessary to create a partnership and where the intention to form one is clear. (Tr. 99). But all this is disregarded because the finding a partnership to exist is made to turn almost wholly on the fact that the third writing frequently uses the words partner and partnership. (Tr. 96, 97). A fair summary of it is that for the purpose of finding that a partnership existed nomenclature is immaterial, but as against any argument that a partnership did not exist the naming the arrangement made a partnership, is of controlling importance.

A striking illustration is the treatment of the claim that no partnership exists because there is no contractural arrangement to share either profits or losses, or both. This, the court meets by again asserting that while such contractual arrangement may be essential yet there is nothing in a name, and that an arrangement to share profits and losses or either may, though not stated in express terms be held to exist if its existence is fairly to be implied from what is said; (Tr. 97.) that an express arrangement on that point is merely a strengthening of a presumption that profits and losses will be shared which arises from the mere fact of an arrangement to engage in a joint enterprise and to share the profits (Tr. 99) (which, by the way, assumes there was an arrangement to share profits.)

If there is an agreement to share profits it must be (according to the court) because there was an agreement that each would devote his entire time to the business. At any rate this is the foundation of said implication, and the court fortifies this by the fact that each of the partners has agreed to put all his property, all his labor, all his time, and all his energies into the business—and it is said that thereupon it may be assumed that the signer by so doing subjects and agrees to subject himself

to all the losses which flow from the enterprise because he has staked his all upon the cast, and he must stand the hazard of the die—wherefore, there is an inevitable implication that each must have intended to share the losses. (Tr. 99).

And there is nothing in the record upon which to base, the finding that all understood the arrangement to be a partnership except the fact that the court abandons its position that nomenclature is immaterial, by holding it to be immaterial as to the first two writings which do not use the word "partner" or "partnership," but to be material that the third writing frequently uses these words. And the bookkeeper, Miss End, had no such understanding after an exhaustive examination of all the books ever kept. After having said that there was no general balance and being then asked, "so it does not go into the partnership," she answered, "there is no partnership. And it does not go into the books of the Fleming Bros." (Tr. 32).

We agree with the court that in determining whether a partnership existed under these contracts there may be taken into consideration among other things the subsequent conduct and admissions of the parties. (Tr. 99). But we submit that everything that was done or omitted denies the existence of a partnership. Though the court has attempted to construe it away, the contracts each and all provide that each member may draw at pleasure without accounting, which is not a usual attribute of a partnership relation. Though the court strenously construed it away, the contracts do provide that what is drawn in the lifetime is as to all but the last survivor all the interest that the drawer can ever have. That is not a usual attribute in a partnership because, there, each partner at all times owns an aliquot share of whatsoever the partnership entity has,

and any partner dying is seized of such share at the time he dies. See (Tr. 96, 97, 100).

And the direct testimony can also not be eliminated by any construing.

The direct evidence on whether or not a partnership existed seems to consist first of the testimony of plaintiff as a witness. She was told she had already stated the property belonged to all the brothers, and asked who she meant by that, whether all four of the brothers—and she answered,

All four of the brothers has been my understanding ever since I was in their family; whatever was earned belonged to the four in equal shares, and all their bills were paid and my husband was supposed to share his the same, and charged to him has been my understanding.

She was then told she had already stated that the expenses were handled by the brothers, and to say what she meant by that, and she answered,

Well, I supposed and have always believed and thought, and as far as my knowledge went, that the expenses was divided equal. That is, whatever expense that I was to or whatever I took out was charged to my husband, and whatever the other families drew from the firm, or the amount of money or whatever they call it, it was charged to each one of their—the head of their family. (Tr. 21.)

Robert J. Fleming testified that he was and for years had been a member of the brotherhood or "aggregation" known as Fleming Bros., and that his brother Charles was a member of that group during his lifetime. (Tr. 33).

In addition to the contract provision that the purpose was to avoid the outstanding attribute of partnership, (4) that death works an interruption and a dissolution—everything shows that no partnership was in-

tended or formed, and that therefore there never was an inheritable estate either in partnership property or the estate of a partner. It appears that all essential things that are not done by a partnership were done, and that what partnerships usually do was not done.

There never was any attempt to divide (47), there was no distribution (31), nor partition (43); never an ascertaining of the present value of the interest of anyone (47); there was no separate property (46, 47); nor individual credit for earning, salary or dividend (29, 30); nor individual bank account (19, 27, 28, 47).

The families drew at will for every sort of family expense, and with no accounting save that the totals went into profit and loss (17, 18, 19, 21, 22, 27, 28, 29). All expenses by the brothers, including their personal ones, were handled by check of Fleming Bros., and the only accounting was putting the totals into profit and loss, (28, 44, 46, 47). They drew without limit because of the survivorship contract (44). The draw included club, church and lodge dues, (30, 31, 32). No account was kept from which could be ascertained what were relative drawings or earnings by the brothers (30, 43, 44). During the 28 years, no balance sheet was kept, nor balance sheets as to profit and loss (30, 31).

The testimony as a whole demonstrates conclusively that while accounts were kept that made it possible to ascertain how the Fleming Brothers organization stood financially, there never was an attempt to keep an account as between, and no way to tell how matters stood between, the brothers.

PART 1-F.

The decision is not sustained because of its assertion that the contracts at bar constituted an ineffective testamentary disposition. Such holding conflicts with the case law everywhere, including that made by the Supreme Court of Iowa.

The court declares:

"The provision therefore in the contract that upon the death of any member his interest in the partnership property should pass to his brother partners is an attempt to make a testamentary disposition of the interest of each partner * * * an attempt to create survivorship among partners is an attempt to make a testamentary disposition of the dying partner's property or his interest in the partnership property in favor of the surviving partners, to take effect after his death." (Tr. 100.)

If this is sound, how could the same court sustain the contract in *Stewart* v. *Todd*, 90 Iowa 283. Why did it not avoid that contract by holding it was a testamentary disposition lacking the forms prescribed for a valid testament. In the Stewart case it is held that even if this were a contract testamentary in character, and though it was not executed with the formalities of a will, it is saved because as here the contract rests on consideration. How could there be a contract in the nature of a testamentary disposition. How could there be an attempt at a testament when, if a signer dies first he would not die seized of any estate. How can this be a contract to dispose of property upon death when by reason of dying first, Charles left no property—in the words of the court:

"The joint tenancy when created vests in each of the tenants a common right in the property which does not survive his death, unless he becomes the last survivor of all the tenants. Then, for the first time, does that which before consisted in a practical sense of a life estate

in the property become vested as an estate of inheritance. In a legal sense his death does not transfer the rights that he possessed in the property to the surviving tenants. Death does not enlarge or change the estate. Death terminates his interest in the estate. It is rather a falling away of the tenant from the estate than the passing of the estate to others." (Tr. 99).

How can one who becomes a party to a survivorship agreement, and dies too early, be held to have made a testamentary disposition. He has no estate while he lives, and by his death is prevented from ever having any—necessarily his contract could not be treated as a testamentary disposition at the time of his death if, by the terms of his contract, the time of that death put him so he never had anything to dispose of by testament.

Since the said contracts recognized as existing and also expressly provided for a present vested joint estate, they are not testamentary in character and are valid and binding upon all whom they affect, the plaintiff included.

McKinnon v. *McKinnon*, 57 Fed., 409. Opinion by Thayer, J., concurred in by Caldwell and Sanborn, J. J.

Wood v. *Logue*, 167 Iowa, 436.
Vosberg v. *Mallory*, 155 Iowa, 165.
Haulman v. *Haulman*, 164 Iowa, 471.
Larimer v. *Beardsley*, 130 Iowa, 706.
Smith v. *Douglas County*, 254 Fed., 244.

The court finds that because a partnership existed the agreements at bar constitute an attempt to make a testamentary disposition of the interest of each partner (a concededly non-permissible disposition) (Tr. 100). One point made in the McKinnon case, C. C. A. 56 Fed., 409, which was a survivorship contract involving a partnership, was that in that case such contract constituted a non-permitted testamentary disposition. And the court held that the point was not well made.

Indeed, this declaration of the court proves too much. If survivorship agreements are a non-permitted testamentary disposal they are that whether they are made by partners or by those who do not sustain that relation. And, if that be so, one cannot understand how any survivorship agreement ever was judicially enforced. For according to the Supreme Court of Iowa all such agreements were non-enforceable because they were an attempt to avoid the statute law concerning testamentary disposition as affecting dower.

And here as elsewhere the court overlooks that if all that it urges were granted there is still no reason why even an agreement in the nature of a testamentary disposition is not to be enforced, where, as here, it rests upon adequate consideration.

PART 1-G.

Related to the assertion of ineffective testamentary disposition is the creation by the court of an imaginary contract to make a last will—and thereupon holding that the making of this imagined contract and its imagined breaking, operate to create a testament—and that therefore plaintiffs in error are attempting to cut off dower by a provision in a will, which of course may not be done.

The court rightly declares that Section 3376 provides the share of the survivor cannot be affected by any will of the spouse unless that spouse consents thereto; rightly declares that this statute has been held to be applicable to personal property and as well as to real estate. (Tr. 114). rightly adds that the widow is entitled to her share in such of the decedent's estate as by his efforts he has accumulated and leaves at his death, and that the husband may not take this away by any testamentary disposition. (Tr. 93, 94). Upon these sound premises it is ruled that, somehow, the plaintiffs in error are attempting to defeat

dower with a testament. The flaw lies in the assumption that the contracts at bar in some way constitute either a contract to make a will or the equivalent of a will.

The record shows that just such unfounded assumptions *are* the basis of the aforesaid ruling. The court says:

> The contract was analogous to and fairly equivalent to a contract to make a will, and only in that character can it be given effect. (Tr. 114.)
>
> It became enforceable as an incumbrance, if at all, against his estate, after his death, and not before.
>
> The result is that the decedent left an estate.
>
> And the contract must be deemed to operate as a claim or incumbrance upon it either in part or in its entirety, in the same manner as a contract to make a will.
>
> Though therefore the contract be deemed enforceable as one to make a will, the question remains whether it is effective as against the widow of the decedent, Charles. (Tr. 114.)
>
> The question still remains whether the fact that the husband during lifetime contracted to make such a will, will avoid the operation of Section 3376. May the wife assert the impediment of the statute, against the operation of such contract.
>
> A contract to make a will would be fully performed by the making of the will. Would the operation and effect of such will be subject to Section 3372? We answer, yes.
>
> If Section 3376 disabled the husband from making a will detrimental to the wife, could the husband nevertheless make a valid contract obligating him to make such a will?
>
> Doubtless it were more accurate to say, not that the husband was disabled from making the will, but that the operation and effect of his will would under the statute be subject to the consent of the widow so far as her distributive share was concerned. (Tr. 115).
>
> Though in this case no will was in fact made, the contract could nevertheless be enforced to the same extent as though the will had been made and not otherwise.
>
> The enforcement of the contract is subject to the limitations of the statute because the will itself would be subject thereto. (Tr. 115, and see Tr. 99, 100).

The argument is this: (a) This is a contract (Tr. 122) to make a will, which contract has been breached. (b) Whensoever such an agreement is made and broken, the remedy of the party not in fault is that he is to be treated as if the will agreed to be made had been made; and he must be dealt with as one basing his rights upon a duly executed testament.

Now, whatever may result from the making and breaking of a contract to will it does not result here, because the contract here is the permissible agreement that the future rights of the parties shall be based on the fact of survivorship (17 Am. & Eng. Encyc. Law Page 65)—was a lawful stipulation as to what should at the death of all but one, be done with the accumulations the parties were then engaged in creating.

Whatever may result where a contract to make a will *is* made that is immaterial where no such contract was made; and here there was no thought of making a contract for or of a will.

The inquiry whether the agreement here be "the equivalent of a contract to make a will" is an immaterial inquiry. For, if it be conceded to be such contract, and to have been breached, not a step is taken towards putting these defendants in a position of one who is basing his rights upon a testament. There is still no will—there is nothing but a broken contract.

An attempted will which fails to be that because not executed as required by statute may be evidence to establish the existence of a contract to give, but is not and cannot be a testament. It ever remains a contract only. Studer, 69 Ga. 125; Wallpole, 5 Ves. Cr. Rep. 402. That is so true that it has been held that contracts to make a will are not entitled to probate because "contracts cannot be probated." Rood, Wills, Par. 51 a.

And the courts have gone so far as to deny probate to instruments that were wills because they were executed in pursuance of a contract such as made the will irrevocable. Sir John Nicholl said: This very irrevocability "destroys the very essence of the will and converts it into a contract, a species of instrument over which, this court has no jurisdiction." And see Rood, Wills, Par. 52; Hobson, 1 Addams, 274, 275; Schumaker, 41 Ala., 454; and Anderson 63 N. J. Eq., 264. (Tr. 124.)

But as said in the Stewart case, here, if it is true that if the writing cannot be enforced as a testamentary instrument, it may if, on consideration, be enforced as a valid and binding contract. To the same effect is *Baker* v. *Syfritt*, 147 Iowa, 65.

"There is nothing peculiar about contracts to make provisions by will. An actual contract must be shown. The parties must have been competent. Their minds must have met on a certain and definite agreement, unless the facts disclose simply a promise which would sustain an action on *quantum meruit*."

Rood, Wills, Par. 54.

But assume that here is a broken contract to make a will, does it follow therefrom that this creates a will, and that therefore these defendants are in the position of seeking to deprive the widow of her distributive share by what amounts to an attempt to take it from her by a will. That can be true only if on breach of a contract to will a will results—and it does not result.

Such a contract, though broken, remains just a contract, and the remedy on breach is a complaint of the breach, with demand for damages, *quantum meruit*, or other remedies allowed for breach of contract. *Hammerstein* v. *Thompson*, Clark & F., 245; *Henry* v. *Rowell*, 64 N. Y. Supp., 488; Leahy, 75 N. Y. S., 72; Furman, 18 Cal.

App. 41; and 1 Schouler, Wills (5th Ed.) Par. 452-454; Albright 103 Iowa, 101.

Or in some cases, recovery of the value of what claimant has given for the promise. Frost, 53 Ind., 190; Sharkespeare, 10, Hun., 311.

Or *quantum meruit.* Taylor, 4 Lea (Tenn.) at 510;; Juncey, 9 Grat. (Va.) 708; Beach, Cont. p. 786; 2 Elliott, Contracts p. 454, note 20.

This means that a will can be a contract, also.

But though a will may sometimes be dealt with as a contract and though a deed or other paper executed as a will may be a testament, even if not in the usual form of wills, it has never been held that a contract to make a will of any other contract which is not executed with statute formality can be substituted for a will, or be treated as being a will, either for the purpose of attack or of defense. (Tr. 124).

Both as to substance and remedy such a contract is but a contract—never a substitute for a "will." 3 Elliott, Cont. pp. 218, 797; 1 Beach, Contracts, p. 487; Bishop, Cont. 516, 518; Page, Contracts, p. 2466.

No writing which lacks the statute attestation is a will for any purpose.

We submit the court may not manufacture a testament and thrust it upon a litigant and thereupon deny him rights, upon the ground that he has no rights which he can base upon a will.

PART 1-H.

The contracts are valid because by them each signer exercised his right to dispose of personal property as he pleased—he disposed of what the joint venture might accumulate. The court holds these contracts were not effective to pass a present estate in any particular property, jointly or severally owned during the lifetime of decedent (Tr. 114).

Surely this survivorship agreement was a disposition in lifetime of *something*. What was that something? It did not exist when the contracts were signed, so at that time no dower could attach. Neither signer at the time of signing owned anything. All the accumulation, so plaintiff herself testifies, were made after the signers went into business under their contract (Tr. 21). It appears that at the time of signing, no real estate was owned; that it was acquired later and was always paid for out of the joint funds and that when any such land was sold, the proceeds went into the joint funds (Tr. 46); that at the time the first two contracts were made, neither signer had any interest in real estate which has not since been disposed of. (Tr. 34.) True, they now own valuable real estate (Tr. 45.) Despite all this, the survivorship contract did nothing but create a survivorship right in possible future personal property, which might be or was later turned into this real estate. The contracts remain a something that deals only with personal estate to be acquired in the future. Wherefore the statutes dealing with alienation of land and cutting off dower right by joining in a deed, are not applicable. The something that was disposed of was in the language of the Mayburry case, 15 Peters 21, a "mere possibility of an estate" which might be "defeated by survivorship." A disposition it was of what a partnership then being formed might accumu-

late. Such disposition as there was, was therefore a disposition of personal property.

It would seem to be fair reasoning that the Iowa rule as to the right to dispose of personal property has its functions in the case at bar for just two material propositions: (a) as it is an absolute right to dispose of such property at will, with or without consideration and without regard to the underlying motive, then the fact that Charles was more provident than to transfer or part without consideration and that he acted from a proper motive, may change the rule as to personal property—that he may do what he likes to the end that he shall not be seized of any personal property when his death comes. In other words, though he could have given away whatever personal property he ever had, and with any imaginable motive, he could not, though the youngest and the most likely to be the last survivor, agree that he should have no personal property at the time of his death, and arrange for a proper purpose and on good consideration that there might never be any personal property to which dower could attach. (b) The law which allows the disposal of personal property at will does not govern in disposal of personality by survivership agreement.

That was never held in Iowa until done in this case. The Supreme Court of Iowa, till now, has always asserted the contrary—see page.....

PART 1-I.

One position upon which the court avoids the contracts, is but the immaterial and erroneous holding that a joint tenancy cannot exist as to personal property and exist only as to lands.—Contrary, inter alia, to Baker, 147, Ia., 49.

In *Baker* v. *Syfritt*, 147 Iowa, 49, the same court enforced a contract creating survivorship which covered

both lands and personal property. In *Stewart* v. *Todd*, 190 Iowa, 283, the court enforces such an agreement which covers some eighteen thousand dollars worth of personal property and also a large amount of lands. The survivorship agreement enforced in *Smith* v. *Douglas County*, C. C. A., 254 Fed., at 247, covers both real and personal property.

A joint tenancy is not confined to real estate but may so exist in personal property.

Atty. Gen. v. *Treas.*, (Mass.) 110 N. E. at 299, 300.

PART 1-J.

Another erroneous position taken by the Supreme Court of Iowa, is the immaterial one that a joint tenancy cannot exist as to a commercial enterprise, which is not only erroneous but is irrelevant because here the agreement is not a dealing with a commercial enterprise but with what might in future be accumulated from carrying on such enterprise.

It is declared that "the property in question came into existence only by the joint efforts of these men working hand in hand, shoulder to shoulder, in a common enterprise, with a common purpose. That purpose was the accumulation of property, the building up of a fortune." (Tr. 93). It is next pointed out that it was the purpose of the feudal system to keep the title in one person * * * "but never so recognized in this state, or generally, as applying to commercial enterprises." (Tr. 95, top Par.)— and that

"Considering the foundation upon which the doctrine of joint tenancy rests it is the opinion of this court that it does not apply to commercial enterprises of this kind, and

that no joint tenancy can arise out of a commercial enterprise such as we have here before us in this case. It is inconsistent with the very foundation principle upon which joint tenancy exists or can exist." (Tr. 95, Par 2).

To say nothing of the fact that nomenclature is not controlling, that a survivorship agreement may be valid though no joint tenancy exists; to say nothing of *Stewart* v. *Todd*, in which the same court sustained a survivorship agreement which in terms deals with the conducting of a general store (surely a commercial enterprise)—to say nothing of *Smith* v. *Douglas County*, C. C. A., 254 Fed. at 247, where a survivorship agreement was enforced wherein the survivor should use the name of a partnership "and continue to buy and sell securities of all kinds, real and personal, in all manner of ways, as has been done heretofore, and do every and all acts whatsoever as fully as when we were both alive"—there is here no agreement as to a commercial enterprise by a survivorship agreement but a contract as to what may exist in the way of property when there is but one survivor. That this property may come from the conducting of commercial enterprises or from any other source, is not material. The contracts would remain operative if the business in which the four brothers were engaged were abandoned. (See *Stewart* v. *Todd*.) Despite such abandonment of such commercial enterprise, whatever property existed when all but one had died would become his property. In a word, these agreements do not deal with the conducting of a commercial enterprise or any other enterprise but reach only whatever property exists (no matter how acquired) at the time when there is but one survivor—and what is said as to commercial enterprise would, therefore, be irrelevant if it be assumed there can be no joint tenancy as to a commercial enterprise.

PART 1-K.

The court errs in holding that in some manner the contracts at bar are not sufficiently supported by a consideration. See 110, N. E. (Mass.) at 299, 300.

It says that the existence of the consideration through mutual promises has been stated by way of assumption only, and it is added:

"In some respects the contract on its face attempted the impossible. It attempted to dispose of the respective interests of the partners and yet to retain the same; to do and yet not to do; to give and yet to withhold. In the nature of the case such contradictions are not enforcible." (Tr. 114).

"It must be noted however that these mutual promises all carried the same infirmity. Each and all were assailable upon the same ground as for failure, or partial failure, in that more was promised than could be performed. If this decedent had survived his brothers and had sought to enforce their promises he would have encountered the same impediment as they have encountered, so that the performance permitted here is as full as the consideration is valid. By their very nature the mutual promises were exactly equal in value as mutual considerations. Between performance and consideration therefore there is complete mutuality in that the one is the full measure of the other.

Promise is partial because the validity of the promised consideration was only partial. The partial failure of consideration would be a just ground of offset against full performance. No legal damage accrued therefor, even as against the decedent or his estate.

In assuming the validity of the consideration of the contract therefor, we do so with this qualification." (Tr. 116).

It is a fair analysis of this that the incident of survivorship that flows from a joint tenancy has no existence because it represents an impossiblity; that is to say, all joint tenancies have exactly the same doing and not doing and the same alleged "impossibility," that the court points

out here. The same impossibility attends the execution of any survivorship agreement. In fewer words, in every case where this attribute of a joint tenancy was enforced, or such a contract ordered executed, the courts erred because they failed to realize that the impossibility argument stood in the way. The books are filled with cases where this "impossibilty" was not thought of and was disregarded. For one, the Mueller case, 131 Iowa, 650, as analyzed in Stewart v. Todd, holds a contract such as the one at bar was fully supported by lawful consideration. At the least, it decided that mutual promise creating the survivorship supports such contract.

It is said in *Stewart* v. *Todd*, 190 Iowa, 283, that where the writing cannot be enforced as a testamentary instrument it may, on consideration be enforced as a valid and binding contract. To the same effect is *Baker* v. *Syfritt*, 147 Iowa, 65.

It can not be denied that here there were mutual promises and the contract recites that the consideration is "the service of each of us rendered in the business of life insurance or of the income to be derived therefrom and of mutual stipulations herein contained." It can not be denied that such service was rendered; nor denied that such writing and such service import a consideration. The utmost that can be claimed for the court is an assertion that the contracts are injuriously affected because complete performance of part of the mutual undertakings is impossible. As said, there was just that difficulty, if it be one, every time a survivorship right was enforced.

Be that as it may, nothing more than a *partial* failure of consideration is even asserted. Such failure of consideration and part failure are matters which under Section 3629 of the Code of 1897 must be "specially pleaded." That seems to be the general rule. It is said in 13 C. J. 741:

"A plea of partial failure of consideration in an action on a sealed instrument reciting a consideration is bad. And at common law partial failure of consideration could not be set up as a defense unless the transaction was fraudulent in its inception. Defendant was obligated to resort to a cross action to recover his damages unless he could show an entire failure of consideration."

While it is true the same text declares that now if there be statute or judicial decision it is generally permitted to interpose the defense of a partial want of consideration or of failure of consideration in the action on the contract (thus preventing circuity of action), of course, that does not say that a denial of *all* consideration in a written instrument which imports a consideration is a good plea to raise a partial lack of or failure of consideration. This text makes this plain by saying that while such defense may now be interposed that is so only "when the facts constituting the defense are specially pleaded or set out by way of recoupment or as a bar to so much of the demand as may be thus answered." (Tr. 124, 125).

There is no plea setting up a lack of consideration or a partial failure thereof, except that in Paragraph 13 of the petition there is an allegation that "said contracts are null and void for the reason that they are without consideration and contrary to public policy and are further null and void because they operate as a fraud, upon this plaintiff and her rights as the widow of the deceased." (7).

We repeat that such plea does not set up a partial failure of consideration. That the court asserts no more than a partial failure. That in fact there is no failure either total or partial; and that if that were not so there was such lack or partial lack in every case wherein survivor rights were enforced, as that one can not understand how the numerous decisions enforcing such rights ever came to be made.

This assertion of impossibilty is but a repetition of the assertion that no contract can operate to deny this widow a distributive share. If there be no such impossibility the argument falls with the premise. If there be such difficulty, we repeat one can not understand why it was not present in every case where surviving rights were enforced, and why there ever was such enforcement.

PART 1-L.

There is a Federal question because the court departed from its settled holdings, that personal property might be disposed of by either spouse absolutely at pleasure. The departure is holding now that personality consisting of a survivorship interest in future accumulations in an insurance business, cannot be disposed of so as to cut off dower right of the other spouse.

This involves a departure from what was ruled in such cases as that of Haines, 330 Iowa, 516; Carruth, 128 Iowa, 123, and Stahl, 72 Iowa, 720. And it also involves a departure from the construction of Section 2436 of the Code of Iowa, which was made in the Samson case, 67 Iowa, 252, and in which case it is expressly held that while that Section gives the surviving widow a distributive share in the personal property of which her husband dies seized, that yet during his life she has no inchoate right in his property and he may dispose of it during his life as he sees fit, and if he sells or makes other disposition which divests him of ownership, she has no claim after his death; and holding further the law has placed no restriction or limitation on the power of the spouse of making such disposition of the personal property as he may elect.

And the court held in the case of Lunning, 168 N. W. 140, that the power to dispose of personality is absolute.

And it so held in the cases of Langworthy, 46 Iowa 64; McDaniel, 55 Iowa, 312; Mallory, 71 Iowa, 63, 64; Paige, 71 Iowa, 318. It seems to be immaterial with what intent the husband parted with such property—Metler, 19 N. J. Eq., 457. And in the case of Burgoon, 121, Iowa, 78, it was held that the share of the widow in personal property cannot be enlarged by treating property parted with by the husband by way of advancement to children, as being still part of the personal property of which the husband died seized.

There was also a departure from *Baker* v. *Syfritt*, 147 Iowa, 49, wherein there was construed an Iowa statute enacted before these contracts were made; the construction was that such contracts as this were valid as to Charles, and binding on plaintiff. And see Vosburg, 155 Iowa, 165, and Haulman, 164 Iowa, 471.

The court does all this though it declares: "We are not unmindful that during the lifetime of decedent there was no legal impediment to his disposing of his personal property." (Tr. 115.) The only explanation attempted is that while decedent could have sold in his lifetime, he did not sell and that while he might have transferred "perhaps even without consideration," he did not transfer. (Tr. 115).

PART 1-M.

It is not a sound differentiation from other decisions of the court, that the contract of survivorship was between husband and wife. It does not matter who the parties to a survivorship contract are, or that the wife is one.

The fact that in *Stewart* v. *Todd*, the survivorship contract was between husband and wife and that it was sustained as cutting off inheritable interest against com-

plaining heirs is a distinction without a difference. When the husband dies seized of nothing there can be no dower rights created by the fact that the wife rather than heirs are complaining. Statute law creates dower rights and also such rights as heirs have. No statute supplies a power that does not exist. If a survivorship agreement defeats an heir because such contract works that there is nothing to inherit, the same contract defeats dower because there is nothing for dower to fasten upon. If a survivorship agreement gives all to the survivor, then if one party die too soon, the result is that against all the world the decedent dies seized of nothing. In that case it can make no difference that the attack is made by heirs and not by a wife. The contract works that there is nothing for either wife or heirs.

The question in the Stewart case was not whether a wife could have dower if her husband died seized of nothing, but whether a contract of survivorship, no matter who the parties were, might work, through one party dying first, that he had no estate at the time he died. The fact that in the Stewart case the contract was between husband and wife is purely adventitious.

It follows that the decision now in review is a pure oscillation. No other decision holds that despite a survivorship contract the spouse of one who dies first has anything whereon to fasten dower. The Supreme Court of Iowa held the contrary earlier than the decision at bar and, as seen, held it later in the Stewart case.

(See Black, Judic. Prec. 463, 565.)

PART 1-N.

Though the court asserts that it looks to substance and not to form it stresses the fact that at one time the signers made abortive attempt to evidence the accumulations of the joint enterprise by shares in a corporation formed by the signers which at most amounted to a change in the form of evidencing such accumulations.

It appears that a number of stock certificates in Fleming Bros., Incorporated, have been cancelled. They were issued in the names of the four brothers and carried in those names up to the time that Charles died. The issue was one-fourth of the total stock to each brother. (Tr. 35, 41). After Charles died, to-wit, and about April 12, 1916, these four stock certificates were cancelled and a similiar amount was issued in lieu thereof, but this time to the three brothers as survivors. (Tr. 35, 40, 41, 47).

It appears in the testimony of Robert J. Fleming, that the four certificates were cancelled and the three reissued "in the names of the three surviviors." (Tr. 40.) That they "were issued to the three surviving brothers by name," "Or the survivor or survivors of them jointly and not as tenants in common" (Tr. 40, 41); that the purpose and object in assigning the older certificates in blank was done by Robert J. "to deliver the stock to the survivors of this survivorship contract agreement" (Tr. 38); that he and his brothers (all three) "took advice on the subject at or about the time the thing was done," and did so "when they were all together"; that, "it was done when the first stock was issued"; and witness thinks they "consulted Mr. Guernsey" (Tr. 38); and he adds that he knows "there was no other reason." (Tr. 38, 39.) The witness Stanhope Fleming testified that the reissue was "made payable to the survivors or survivor, without the assignment on the back." (Tr. 48.) The forms appear at Tr. pp. 35, 36, 37.

The court says "we are not concerned with forms. We look to the substance of the property rights of this decedent." (Tr. 118). Yet it is stressed that the four brothers created a corporation of which they were the sole share holders, that each received his pro rata of the shares and that, thereupon each purported to transfer his shares by endorsement and delivery.

Form is not disregarded, because the court holds that what was so done with reference to the issuing of shares in the Fleming Bros. Corporation is matter of substance, and that therefrom it results that Charles, at his death, left an estate to which the plaintiff's right of dower could and did attach. This, though plaintiff declares over and again that said corporation and the said shares were and remained the property of Fleming Bros. an alleged partnership; and therefore that her husband died seized "of an individual interest in all the property of the partnership, which partnership property includes all the capital stock and property," of said corporation. (Tr. 2, 3, 7, Par. 15).

Though it asserts it is not concerned with mere form it admits that:

"The property still remained in the dominion of the same parties. Its benefits still accrued to them. No fifth party had acquired interest or encumbrance thereon. * * * If they had then attempted a partition as between themselves each would have received his one-fourth thereof." (Tr. 119.) "That there was no transferee and therefore: at this point we are not concerned with forms. We look to the substance of the property rights of this decedent. Though in form he transferred all his property to the corporation, he was a joint creator of the corporation and owner of one-fourth thereof. Though each of the four transferred his stock in severalty to all of them jointly, and thereby changed the form of his property right, he still owned the substance thereof." (Tr. 115).

It seems to us that the creation of a corporation and the said dealing with its shares was nothing but a change in form—and that this corporation and said dealing with its shares was simply substituting shares for the property that belonged to the last survivor under the agreement between the four brothers—that the case stands precisely as if those who owned, say, a stock of goods, formed a corporation, became its owners and thereby the owners of its shares—a mere change of form in property from goods to shares.

Creating the corporation and so issuing and dealing with the shares is nothing but a change of form. If four partners conclude to symbolize hardware owned by the partnership by stock certificates issued to the partners, the rights of each in the hardware remains unchanged. The share certificate represents the hardware.

For one illustration: Plaintiff herself pleads that the Fleming Building in Des Moines and other real estate is a part of the assets of Fleming Brothers, Incorporated. The interest of decedent in said property being evidenced by his certificate of stock in Fleming Brothers, Incorporated, in the amount of Twenty-five Hundred shares. (Tr. 3).

In no view was more change effected in partnership rights than if it had retired from business and put all the accumulations therefrom into government bonds. All that was by possibility accomplished is that a share in business accumulation became a share in government bonds.

And the court inquires, "to whom did he endorse and to whom did he deliver," it declares, "there was no transferee and no taker of delivery, they all put their shares into a common receptacle and locked them in a safe to await eventualities." This can mean nothing except a strong intimation that no delivery of the shares was effected. As-

suming that to be so, surely the dealing with the shares is immaterial. If the shares were never delivered, nothing was ever done to change the property rights that each had before the corporation was formed or a share was issued.

PART 1-O.

The decision by the Supreme Court of Iowa turns largely upon a holding that the contracts at bar fail because in some way each one of the signers failed to invest each of the other signers with a full title. This, though the very essence of a survivorship agreement, is that there shall be no investment of a complete title in anyone and until such time as a last survivor exists.

The court seems to require for the sustaining of a survivorship agreement that each contributor to the joint venture must vest such title as he has or ultimately may have in each of the other parties to the contract, and that it is an insufficient disseizin and vesting to vest no title except that the last survivor shall have complete title of what property exists when he becomes such last survivor. And as it is the very essence of survivorship contracts that no one shall be vested with complete title until there is a last survivor, and as that is always the state of the title in such agreements, every decision that ever sustained a survivorship contract, therefore, erred, on that theory. The court says: (114)

By a series of instruments the four conveyed their legal title to a corporation organized by themselves as exclusive stockholders. Each received his pro rata number of shares of stock. Thereupon each purported to transfer his shares by indorsement and delivery.

To whom did he indorse and to whom did he deliver? There was no transferee and no taker of delivery. They all put their shares in the safe to await eventualities.

The property still remained in the dominion of the same parties. Its benefits still accrued to them. No fifth party had acquired any interest in or incumbrance thereon. The property rights of the four respectively, whether legal or equitable, were mutual and exactly equal.

If they had then attempted a partition as between themselves, each must have received his one-fourth thereof.

Assignment as to the comparative shares, it appears was made by endorsement in blank. (Tr. 44.) This assigning was done on the day the shares were issued. (Tr. 37, 42.) And the stock so assigned in blank was put into an envelope. (Tr. 38.) Included was 1250 shares to Charles, assigned by him in blank. (Tr. 36.) All were put into envelopes. (Tr. 37, 38, 39, 40, 41.) These envelopes were accessible to each of the brothers. (Tr. 41, 42, 46.) The envelopes were put into a drawer in a safe to which all had access. (Tr. 39, 42, 43, 44, 46.) They remained in this receptacle and were there at the time Charles died. (Tr. 46.)

The sum of the argument on lack of delivery, the retention of joint possession, and the preserving equal access to each partner is that, somehow, this suit is affected by lack of disseizin of one contracting party, and by failure to deliver to and vest in the other party, and that there is fatal uncertainty as to where title is lodged. It is an argument that has made much bad law, on so-called contingent remainders.

The court ignored the law of contingent remainders under which there may be a vesting for some purpose in a class, though at the time when the remainder is created no one can tell who, if any one, will be in that class when the time for distribution comes. It should have been held that if vesting be necessary that here was a sufficient vesting, to-wit, an inchoate vesting, in that, someone ultimately shall have full title; that though there was but inchoate

title the one who died too soon died seized of nothing and, therefore, had no estate upon which dower rights could be fastened. In the language of *Wood* v. *Logue*, 167 Iowa, 436, 443, the last survivor becomes the sole and unqualified owner and that the one who dies first has nothing when he dies. He fails to get an estate. He merely departs from his estate at his death. And see Cyc. pp. 901, 902, 1891, 1895, 1896.

One can contract as to what shall be done after he dies, McKinnon case, (C. C. A.) 56 Fed., 409; *In re* Neil, 71 N. Y. Supp. 840; Page, Cont., par. 397.

On the reasoning of the court, what the courts have held as to contingent remainders is bad law, and there is no defending such decisions as that in *Woodard* v. *Woodard*, 184 Iowa, 1178, and the numerous decisions therein cited in support. In the Woodard case it was contended that when the will was executed it could not be known what great-grandchildren would be in being when the time for ultimate transfer and vesting arrived, and that therefore the remainder was a contingent one. The court announced that when said will was executed, named great-grandchildren were in being, with present capacity to take; that therefore, though it could not then be known that any of these great grand-children would be living when the life estate in the grandchildren lapsed, or that later born ones would not then be *in esse*, yet the remainder was vested; and that—

"Unless something not yet discussed avoids it, the great-grandchildren took title on the day the testator died."

The effect is that there was a vesting in the class known as great-grandchildren though no one could tell

who, if anyone, would be in the class when the distribution came.

On this line of decision it follows title was sufficiently vested in each of the brothers, because it was agreed that one of the four in their class should some time have full title; and the fact that it could not then be known which one in the class would be such ultimate beneficiary does not prevent a sufficient vesting of title in the class.

It is not unknown in the law that title vests even though full use and enjoyment be postponed, and even though it may not, at the instant when title is said to vest, be known with definiteness who will ultimately have full title.

The uncertainty as to who will be the owner or beneficiary was a difficulty which was present also in the cases wherein such contracts as this have been held to be valid. In *Wood* v. *Logue* and *Stewart* v. *Todd*, it was as uncertain who would get full title by becoming the last survivor as it was uncertain at the time the contract at bar was signed which of the four would live the longest.

At another point the court deals with nomenclature as it does not deal with it elsewhere.

The character of the title held by these defendants is the subject of our investigation, and controls the rights of this plaintiff. (Tr. 93.)

It will be noted that in the first two writings no direct provision is made for the vesting of the title to accumulated property in any designated entity or person.

It is now assumed by these defendants that it vested in the brothers as joint tenants.

No estate in the tangible property that accumulated as a result of the business enterprise is by express provision vested in any person, persons, or entity. Therefore, we turn to the third writing for further light as to the purpose and intent of these parties, and the status created by preceding writings. (Tr. 96.)

The title to property that can be the subject of ownership, we must assume, vests in some one, whether it be an individual, individuals, or a legal entity.

This property, when it came into existence, vested in these brothers. They became vested with the title as joint tenants, or they became vested with the title as tenants in common, or they became vested with the title as a copartnership. (Tr. 93.)

To be sure, it is settled that title to property subject to ownership must vest in someone, an individual, individuals, or a legal entity. But it is irrelevant, especially where it is also said that this property when it came into existence vested in these jointly, and that they became vested either as joint tenants or by placing title in a corporation.

If vesting be essential the parties to a joint tenancy or to a survivorship agreement have such vesting as is essential in that relation.

For the purpose of joint tenancies there is sufficient vesting if each has the same interest created by the same act or instrument, to vest at one and the same time, when the time for vesting does come, and each has the entire possession of every item of property held in joint tenancy as well as the whole. Park, Dower 37; Scribner, Dower, 269; 4 Kent, Com. 37.

While as a fiction of law each joint tenant holds all the property at all times, and that, ordinarily, there can be no recovery because the joint tenant uses all the property or its usufruct, 23 Cyc. 490, B. 491 D—on the other hand, one tenant may maintain assumpsit against the other to recover his share of the property or its proceeds. *Stone* v. *Aldrich*, 43 N. H., 52.

In *Allbright* v. *Hannah*, 103 Iowa, at page 192, the contract was that the plaintiff should

have certain lands upon the death of one Remey, or when Remey and his wife were done with it, and it was said that this "was either the present transfer of the fee, subject to a life estate, or an agreement to will the property to the plaintiff," and that whichever it may have been, "it was good if plaintiff accepted it and acted thereon, and took possession of the land thereunder." This may not fit the present discussion with absolute exactness, but it does settle that for the purposes of sustaining survivorship contracts, that, may be deemed a present transfer of the fee which for some purposes is not deemed to be such transfer.

It is not straining to say that if vesting and divesting were material, each here was so divested and each other so invested, as that the title remained inchoate in the four until three had died, and that then full title vested in the survivor.

The court departed from its holding in *Albright* v. *Hanna*, 103 Iowa, 192, wherein it is ruled that for the purpose of sustaining survivorship contracts there may be sufficient transfer by conveyance when for some purposes such would not be deemed such transfer.

And it departed from its holding in *Baker* v. *Syfritt*, 147 Iowa, 49, in holding that a disseizin or delivery or vesting from and by and between each of these four was essential to the validity of the agreement into which they had entered.

It was error to hold that, say, the depositing of said stock by each of the four and the asssignment by each in blank did not amount at least to a constructive delivery to the joint tenancy.

There is title in all the parties subject to the contract limitation that the last survivor shall have sole title.

Can it be possible that a contract of survivorship wherein several agree that the one last remaining alive shall have all the property of the others is in any way affected by delivery, disseizin, and vestiture. If that be so, it is inexplicable why a survivorship contract was ever upheld. For in each and all the cases of such contracting no party was disseized, no party was vested with title to what he did not already own; and neither party delivered anything to the other except the contract itself. In each and all of such cases each contracting party kept full control of and access to the individual property of his that had been made the subject of the contract. In each of them it could have been said, "There was no transferee and no taker of delivery". And what an absurdity it would be to require mutual delivery in such cases. A. owns 10 horses; B. also owns 10. Can they make no effective agreement that the survivor shall have all that remain of the 20 unless when the parties sign each delivers his 10 horses to the other? To follow that to its end, the moment the exchange was made it would seem to become necessary to keep on transferring and retransferring. Must one who puts his farm into a survivorship contract deliver his farm at the time when he executes the contract?

In the supposed case of the contract where each party has 10 horses, will it invalidate the contract because both parties had free access to both sets of horses and, for that matter, if they both had control of both sets.

In *Steuart* v. *Todd*, the general store case, not an item of the stock was ever delivered into the sole control

or possession of either party to the partnership contract. Every item was at all times as much under the control and in the possession of one partner as of the other. There was not a moment when one party did not have equally full access to everything belonging to the partnership; the benefits of the existence of the general store "still accrued" to both contracting parties; in the Stewart case, as here, in the sense that the court uses the words here, "there was no transferee and no taker of delivery." (Tr. 120.)

In the Stewart and in all like cases, just as here, the property "still remained in the dominion of the same parties," if the partners had attempted partition as between themselves, "each must have received his one-fourth thereof." There, as here, no party other than the ones contracting "had acquired any interest or incumbrance thereon"; as here, in all cases where there is a contract of survivorship in the sense the words are used by the court, "they all put their shares in a common receptacle and locked them in the safe to await eventualities." That is to say, in the Stewart case the joint property was kept in a common receptacle, the partnership store, and kept there even as things are kept in a safe, to await eventuality, the death of one partner, on the happening of which the property would be removed from the common receptacle where it was constructively locked up and be given to the survivor.

If divesting and vesting be essential, there was the same flaw in every case wherein in spite of such flaw survivorship contracts have been upheld.

No survivorship contract should ever have been upheld if here is the true theory, because not one could meet the test now formulated.

The very essence of such a contract is that benefits and dominion shall be temporarily retained with access and control, and that the final vesting of title must wait the happening of the contracted-for eventuality.

The court holds the contracts at bar may be avoided because there was no disseizin from one of the four in favor of either of the others; that such disseizin or a delivery or a vesting from each to the other was essential, holds it to be material that the tangible property accumulated was not so vested; that no estate in which tangible property accumulated as results of the business enterprise was vested in any person, persons, or entity, by express provision; that the rights of plaintiffs in error are affected by a failure of each or either to deliver and vest or to effect disseizin for each of the others; that for the purpose of this suit it is to be assumed that title to property which can be the subject of ownership must vest in someone, either an individual, individuals, or a legal entity; that for the purposes of this suit any property that can be the subject of ownership must be assumed so to vest; to be material, that the property here at all times remained in the dominion of the four brothers, and in that of the three after the death of Charles; to be material, that the benefits of said property still accrued to the same parties, that no fifth party ever acquired an interest in said property or an encumbrance thereon; to be material, that had the four at any time attempted partition, each must have received his one-fourth of the corporate property or stock; to be material, that there was no transferee; to be material, that there was no taker of delivery; to be material, that there was no delivery of the corporate stock made; to be material, that it cannot be told to whom Charles made endorsement of the

corporate stock; to be material, that the four all put their shares into a common receptacle and locked them in a safe to await eventualities; to be material, that each and every item of property was at all times under the control and in the possession of one partner or joint venturer as much as in that of the other.

All this proves too much. It would be immaterial if the record showed that it exists. If though true these things are material and their absence or presence avoids survivorship contracts, it cannot be explained how a survivorship agreement was ever sustained by the courts. In many, if not in all the decisions sustaining such contracts the tangible property accumulated was not vested by each of the parties in each of the others. In many, nay in most of these decisions, there was no express provision in the agreement vesting what is accumulated in any person, persons or entity; in all of them there was a failure of each to deliver and vest in and to make disseizin to each of the others, nor a vesting in an individual, individuals, or in a legal entity. Can it be possible that if two men pool their individual ownership of horses with agreement that the survivor should have whatever was left of the horses after the joint venture with them had ended, that such an agreement could be avoided because the owner of one set of horses failed to vest his title in the other and that the second failed to vest his title in the first. Could such an agreement be avoided because the first set of horses was not delivered over by the owner to the other venturer, and that the other did not deliver his horses to the first. The very essence of such arrangements is that the title shall not be vested finally in any one until there is a last survivor.

In the multitude of decisions sustaining survivorship agreements the property involved did not at all times re-

main in the dominion of each party to the contract, nor in three survivors where the fourth pre-deceased. In the Stewart case, certainly, the property involved did not at all times remain in the dominion of the two parties to the agreement. Each had as much dominion as the other and neither one complete dominion until he became the survivor. Take next the argument that the contracts at bar are avoided because the benefits of the property involved still accrued to the same parties, that no fifth one ever acquired any interest in the property, and that if the four at any time attempted partition each must have received his one-fourth of the corporate property or stock. If that avoids the contracts here, it is difficult to understand how a survivorship agreement was ever judicially sustained. It is safe to say that in all such agreements the benefits of the property involved remain in the same parties and that no outsider gets an interest therein, and if there were partitions each of the signers would get his share. This would remain true until there was a last survivor. If material here it was so in all such decisions, and yet such decisions were made. In the decisions sustaining survivorship contracts there was no more transfer than there was in the illustration as to the two sets of horses. In the decisions sustaining such agreements there was no delivery as between the signers any more than in the illustration of the horses, or in the Stewart case. There was no time when either of the Stewarts delivered any property to the other. The very essence of survivorship agreements, as seen in the horse illustration, is that there shall not be delivery as between the contracting parties until it occurs when the last survivor comes into existence. How can the fact that the four brothers all put their stock shares into a common receptacle and locked them in a safe to await eventualities avoid their contract.

In the Stewart case the property was kept in a common receptacle, to-wit, the store, and it was kept there to await eventualities, to-wit, the death of one party. That did not keep the Supreme Court of Iowa from sustaining the agreement between the two Stewarts. How is it material that the property here at all times remained under the control of the four; that every item of property was at all times under the control and in the possession of one party as much as in that of the other. In survivorship agreements there never is a time when every item of property is not under the control and in the possession of all signers; this is so until there is a last survivor. There is not a moment either when each party has not equal access to what belongs to the joint enterprise, and in which the benefits will not accrue to all contracting parties until the time comes when one party dies.

The court proves too much:

The very essence of such contracts is that benefits and dominion shall be temporarily retained with access and control, and that vesting of title is deferred.

The very essence of such contracts is that the final vesting of the title must wait the happening of the contracted for eventuality. In all of them there is title in all the parties subject to the contract limitation that the last survivor shall have full title.

Can it be possible that a contract of survivorship wherein several agree that the one last remaining alive shall have all the property of the others is in any way affected by delivery or lack of it, disseizin and vestiture.

If that be so, it is inexplicable why a survivorship contract was ever upheld. For in each and all of them no contracting party was disseized, no party was vested with title to what he did not already own, and neither delivered anything to the other except the contract itself.

In each and all each contracting party kept full control of and had access to the property of his that had been been made the subject of the contract.

In each it could have been said "there was no transferee and no taking of delivery."

In all cases there was the difficulty of saying who would be the ultimate owner or beneficiary.

In *Wood* v. *Logue* and in *Stewart* v. *Todd*, it was as uncertain as here as to who would get full title by becoming the last survivor.

In the Stewart case, as here, it was true that if the parties had attempted partition as between themselves "each must have received his contract specified share thereof."

In the Stewart case the benefits of the existence of the general store "still accrued" to both contracting parties.

In the Stewart and in all like cases the property "still remained in the dominion of the same parties."

It was true in the Stewart case, also, that no party other than contracting ones "had acquired any interest or incumbrance thereon."

GRAND DIVISION TWO.

THIS CASE RAISES A FEDERAL QUESTION BECAUSE THE SUPREME COURT OF IOWA IN REACHING THE CONCLUSION THAT THE CONTRACTS AT BAR DID NOT AFFECT THE RIGHT OF DOWER DEPARTED FROM ITS FORMER DECISIONS AND CONSTRUCTION OF STATUTES AND IN SUCH WAY AS TO AFFECT THE CONTRACTS AT BAR RETROACTIVELY—THUS VIOLATING THE CONSTITUTION OF THE UNITED STATES AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

PART 2-A.

While it is the general rule that the courts of the United States will follow the latest settled adjudications by the court of last resort of the State, and especially where that court has done nothing but construe a state statute, and while the Federal courts will in certain cases follow such latest adjudications even where they work a reversal of former decisions on part of said state court—there is a settled exception to this general rule—which exception has been most numerously affirmed.

Among many others we cite:

Douglas, 101 U. S., 677; Loeb, 79 U. S. 472.
Taylor, 105 U. S., 72; *Trust* [illegible]*o.* v. *DeBolt*, 16 How. 425.
Anderson, 116 U. S. 356, 6 Sup. Ct., 413; ..... U. S. .....; Lamson, 76 U. S. 485, 486.
Gelpke, 1 Wall. 194; Burgess, 107 U. S. 33, 34.
Havemeyer, 3 Wall, 294; Mitchell, 4 Wall. 270 (Citing Gelpke.)
Rigg, 6 Wall. 106; *Lee County* v. *Rogers*, 7 Wall. 181.
Chicago v. *Sheldon*, 9 Wall. 50; Olcott, 16 Wall. 678.

Talcott, 86 U. S. at 678; *Wade* v. *County*, 174 U. S. 499.

Green, 109, U. S. 104; Butz, 75 U. S. 575.
Township v. *Aetna Life*, 138 U. S. 215, 216.
Groves v *Slaughter*, 15 Peters, 449.

This exception has been enforced as to contracts.

Rowan's case, 46 U. S. at 38, 39.
Ohio Life Co. v. *DeBolt*, 57 U. S. at 431, 432.
Olcott's case, 83 U. S. at 690.
Douglas Case, 101 U. S. 686 (contract rights).
Burgess case, 107 U. S. at 33, 34.
Pleasant Twp. v. *Life Co.*, 138 U. S. 67.
Wade's Case, 174 U. S. 499.
Loeb's Case, 179 U. S. 472.

The Loeb Case, 179 U. S. 472, 21 Sup. Ct. Rep. at 182, declares that the decisions affirming this exception were so numerous "that any further discussion of the question is unnecessary and we need only cite some of the adjudicated cases."

This exception has been applied to commercial paper.

Douglas 101 U. S., 731, 732.

In the case of Loeb 179 U. S. 472, 21 Sup. Ct. Rep. at 182, this court declared the court below to have held it to be its duty to enforce the provisions of the constitution of Ohio as interpreted by the Supreme Court of Ohio at the time the bonds were issued, and not to permit contrary decisions until after the issue of these bonds, to have a retroactive effect. This court declares that this holding below was in accordance with the long established doctrine of the Supreme Court to the effect that on a question of the power of a municipal corporation to make negotiable securities, the Federal court will determine that to be the law what was judicially declared by the highest

court of a state when the securities were issued, and that the rights and obligations of the parties accruing under such a state of the law may not be affected by a different course of judicial decisions subsequently rendered, any more than by subsequent legislation.

PART 2-B.

That in the case at bar there is such impairment of contract and contractual rights as raises the Federal question through change in decision and construction of statutes, is demonstrated by the extension of the rule of the Gelpke case which the later cases have accomplished.

In the case of Muhlker, 197 U. S. 544, 25 Sup. Ct., 522, it appears that one time the Court of Last Resort of New York held that damages were recoverable where an obstruction impaired the easements of air, light and access. Muhlker, by a chain of conveyances had a covenant in deed by his remote grantor which covenant could reasonably be construed to give to and preserve for all grantees in the chain the easements of air, light and access. Defendant raised its tracks in such manner as to impair those easements possessed by Muhlker. On suit by Muhlker said New York Court of Last Resort denied damages. It reverses its said earlier decision to which Muhlker was no party. It declares that reflection and research have convinced it that the earlier decision was unsound. Muhlker appealed to this court, and it said:

"In the case at bar there is a complete change of ruling by the Court of Appeals. The Lewis case is declared in so far as its expressions concerning rights of abutting property owners are concerned, to have been improvidently decided and the elevated railroad cases which were made its support were distinguished."

The Supreme Court says another distinction made in the Muhlker case below is that the act of the railroad was the act of the state. It answers this claim by saying, "but this defense was made in the Lewis case, and it did not give the court much trouble" (527).

It adds: That the court below rests itself on the one proposition that the command of the Act of 1872 was beneficial to the public; that it made the state the builder of the new structure and its use by the railroad mere obedience to the law. It answers this claim by saying it does not follow that private property can be taken either by the erection of a structure or its use, and that this was plainly seen and expressed in the Lewis case as to the use of the structure; that when the Lewis decision was made, "there was no hesitation then in marking the line between power of the state and the duty of the railroad and assigning responsibility to the latter," and that this was in accordance with principle. (524)

The court continues that plaintiff urges the contract clause of the Constitution, also the Fourteenth Amendment, invoking the latter because the Act of 1872 does not provide for compensation to property owners, and the first, on account of the condition upon which the strip of land constituting the avenue was conveyed to the city. It is then said:

"The details of these conditions we need not repeat (524) nor discuss. They are stated at length in the Lewis case, and the conclusions there expressed are not disturbed by the decision of the Court of Appeals in the case at bar. The case is, therefore, presented to us as to the effect of the deed of Poillon to the plaintiff and to the city, as constituting a contract; and the effect of the Act as an impairment of that contract, or as taking plaintiff's property without due process of law.

The court concludes with the statement that these questions were directly passed on and negatived by the Court of Appeals in the Lewis case. (525)

PART 2-C.

This exception had been applied to matters other than those heretofore enumberated herein.

In the Muhlker case, 197 U. S. 544, 25 Supreme Court 522, the remote grantor of plaintiff had conveyed to the City of New York with certain reservations which are construed to retain the easement of light, air and access—and it was held that a change in decision from one holding that damages were due for impairment of these easements, was such change as created a federal question.

This decision has been often referred to but as yet has never been criticized.

It is one holding of the Gelpke case:

"That where by a series of decisions of a court of last resort of a state the right to give legislative authority to subscribe to railroads and to issue bonds thereon was settled in favor of the right, these decisions being in harmony with the weight of authority will be regarded as a true interpretation of the Constitution and laws of the state so far as related to bonds issued and put upon the market during the time that those decisions were in force —and the fact that the same court now holds that those decisions were erroneous and ought not to have been made and that no such power existed as the former decisions decided did exist, can have no effect upon transactions in the past, however, it may affect those in the future."

Miller, J., dissenting in the Rigg's case (73 U. S. at 202) says:

"The next step was the decision of the Gelpke case in which the court held that the later decisions of a state

court on the construction of its own constitution, although unanimous, would be disregarded in this court, in county bond cases in favor of earlier decisions made by a divided court."

In Havemeyer's case, 70 U. S. at 303, it was said:

The court can look only to the condition of things which subsisted when the paper was sold, and that so holding brings the case within the rule of Gelpke's case, which is stated to be that if a contract when made was valid by the Constitution and laws of the state as then expounded by the highest authorities whose duty it was to administer them, no subsequent action by the legislature or judiciary can impair the obligation—that this rule was established upon the most careful consideration and the court thinks it rests upon a solid foundation and feels no disposition to depart from it.

In *Lee County* v. *Rogers*, 74 U. S., 183, 184:

The Gelpke case is construed to hold that if at the time bonds were issued the validity of that class of bonds was upheld by the settled adjudications of the highest court of the state, a reversal in those decisions denying that validity will not be followed by the federal court.

In the Gelpke case, 1 Wall. 175, the court said:

"Although it is the practice of this court to follow the latest settled adjudications of the state courts giving construction to the laws and Constitutions of their own states, it will not necessarily follow decisions which may prove but oscillations in the course of such judicial settlement. Nor will it follow any adjudication to such an extent as to make a sacrifice of truth, justice and law."

PART 2-D.

A full statement of what the scope of said exception and the reasoning upon which it rests, follows below.

Such contract and bonds have been held to be valid upon the principle that the holder upon purchasing such

bonds and the parties to such contracts were entitled to rely upon the prior decisions as settling the law of the state. To have held otherwise, would enable the state to set a trap for its creditors by inducing them to subscribe to bonds and then withdrawing their only security. (Among others the Gelpke case is cited.)

It is held in the Burgess case, 107 U. S. at 33, 34, that when contracts and transactions have been entered into and rights have accrued thereon under a particular state of decisions, or when there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case although a different interpretation may be adopted by the state courts after such rights have accrued. This exact pronouncement is approved in *Pleasant Twp.* v. *Aetna Co.*, 138 U. S. 67, 11 Sup. Ct. Rep. 217.

In *Loeb* v. *Trustees*, 179 U. S. 472, 21 Sup. Ct. Rep. 174, one syllabus point is this:

"The Federal Courts in determining contract rights as affected by a state Constitution, will enforce the contract in accordance with the Constitution of the state as interpreted at the time the contract was made by the highest court of the state, without regard to a contrary interpretation made by such court after the contract was made."

The court says:

"Our decisions to that effect are so numerous that any further discussion of the question is unnecessary, and we need only cite some of the adjudicated cases." (182)

In Anderson's case, 116 U. S. 356, 6 Sup. Ct. Rep. 415, 416, it is held that the rights of the purchasers or holders would not be affected by a subsequent change of decision, because it is the long-established doctrine of the

Supreme Court from which, as was recently said in Greene's case, 109 U. S. 104, 3 Sup. Ct. Rep. 69, the court is not disposed to swerve—that where the liability upon negotiable securities depends upon a local statute the rights of the parties are to be determined according to the law as declared by the state courts at the time such securities were issued.

It is true, after the state court had been accorded a *locus penitentiae*, after the counties had lost in the Federal Supreme Court by following the state court, and after the bonds in question had entered into circulation as commercial paper on the faith of its prior rulings, the light of a new revelation fell upon it, and it discovered the unconstitutionality of the said act of 1868 and the validity and virtue of the act of 1861. But the mischief done was then incurable. The Supreme Court of the United States refused to follow these later decisions of the state court on the well-established rule that the contract, as respects commercial paper, should be enforced according to the construction put upon the local statutes by the local court at the time the contract was made or the bonds went upon the market.

In re Copenhaver, 54 red. at 664.

The Douglas case, 101 U. S. 687, declares the Supreme Court always regrets to find it is in conflict with the courts of states in matters affecting local law, but that when necessary it can not refrain from acting on its own judgment, unless it were willing to abrogate its constitutional jurisdiction.

In *Anderson* v. *Township*, 116 U. S. 356, 6 Sup. Ct. Rep., 416, the result of this reluctance is a declaration that for the sake of harmony the Federal Court will lean to the construction of the state court "if the question seems to be balanced with doubt."

But where the court feels clear, it will not follow a construction of the state court. This, on the reasoning that if comity to state decisions were pushed to that

extent it is evident that the constitutional provision which secures to the citizens of another state the right to sue in the courts of the United States might become utterly useless and nugatory.

Rowan v. *Runnels*, 46 U. S. 139.

In the Douglas case, 101 U. S. at 686, 687, the court says it approves this statement of the Rowan case, and adds that non-interference with retroactive decisions affecting the obligation of bonds or contracts is prohibited by the Constitution—and

"The question presented, as we view it, is not so much whether these late decisions are right, as whether they should be followed in cases having reference to bonds put out and in the hands of innocent purchasers when they were announced."

In *Ohio Life Co.* v. *DeBolt*, 57 U. S. at 432, the court says that the writ of error to a state court would be no protection to a contract if the Supreme Court were bound to follow the judgment which the state court had given, and which the writ of error brings up for revision.

In the Wade case, 174 U. S. 499, 19 Sup. Ct. Rep. 718, 719, the theory of not following is put upon the ground that the earlier construction upon which action was had is to be deemed to always have been the proper construction, and therefore the one to be followed.

"The laws existing at the time of the issuance of the bonds, and under the authority of which they were issued, enter into and become a part of the contract in such a way that the obligation of the contract cannot thereafter be in any way impaired or its fulfillment hampered or obstructed by a change in the laws (citing among many others, *Louisiana* v. *Pilsbury*, 105 U. S. 278.)

Moore v. *Otis*, 275 Fed at 751.

The Supreme Court thinks a right construction can not be taken away as respects previously existing contracts by judicial decisions of the state courts which construe the statutes wrongly.

Butz v. *City*, 75 U. S. 575.

PART 2-E.

The decision now in review is merely an oscillation in the course of judicial settlement attempted by the Supreme Court of Iowa, and despite the practice of the Supreme Court to follow the latest adjudications of state courts construing the laws or constitution of the state, it will not necessarily follow such oscillations nor follow any adjudication to such an extent as to make a sacrifice of truth, justice and law—Gelpcke v. Dubuque, 68 U. S. at 176.

What is the settled adjudication, or even the latest adjudication on the matter in hand. Is the decision at bar anything more than an oscillation in the course of settlement?

For years the Supreme Court of Iowa held that as to personal property either spouse had the full *jus disponendi*. This held, of necessity, that there was the right to dispose of it by entering into a joint survivorship agreement wherein the title was kept inchoate and away from any particular individual party until it was ascertained who was the last survivor. To this unbroken line of decisions was added *Baker* v. *Syfritt*, 147 Iowa, 49, which ruled that a survivorship agreement, including both land and personal property, was valid and enforcible. Then came *Wood* v. *Logue*, in the 167 Iowa, flatly approving such agreements. Then came the lone oscillation, to-wit: the instant case. It was almost immediately followed by *Steuart* v. *Todd*, 190 Iowa, 283, which flatly followed and extended the doctrine of the Logue case.

At this writing the Stewart case stands unquestioned by the Supreme Court of Iowa. It is possible there will be no further oscillations, and that the Stewart case will remain the final swing-back to the rule unbroken except by the Fleming decision. It may be that when this case is presented to this court the Stewart decision will then be the latest adjudication; as it surely is one that follows what for years was the settled adjudication.

PART 2-F.

There does not seem to be a single court of last resort decision which holds with the decision at bar. And that decision seems to be contradicted by the same court that pronounces the instant one.

That court said in Baker's case, 147 Iowa, at 62:

By Code, Section 3376, it is provided that the right to a widow's share shall not be affected by any will of the husband. But it must be remembered that unless the husband has at some time during the marriage relation held a heritable estate of some kind—legal or equitable—in the property in question, no right of dower could attach thereto in the wife's favor. The stream can not rise higher than its source. *Dunham* v. *Osborn*, 1 Paige (N. Y.) 634; *Pritts* v. *Ritchey*, 29 Pa. 71; *Apple* v. *Apple*, 38 Tenn., 348; *Edwards* v. *Bibb*, 54 Ala. 475; *Sullivan* v. *Sullivan*, 139 Iowa, 679.

The unbroken voice of authority is against the position taken in the case at bar. For illustration:

It is held in *Attorney General* v. *Treasurer*, (Mass.) 110 N. E.:

Where two sisters received property by conveyance as joint tenants, and also made deposits in a savings bank for their joint use and benefit, and purchased certain securities, which were issued to them as joint tenants,

their estate included the right of survivorship, and the estate in all the properties was a joint tenancy.

Upon the death of one joint tenant, the other takes the whole estate, not by descent as the heir at law of the other nor under the laws regulating intestate succession, but as the sole surviving tenant.

PART 2-G.

The earlier cases have been followed because of acquiescence and general understanding.

In *Township* v. *Talcott*, 86 U. S. 678, it is said: "And during the period covered by their enactment neither of the other departments of the government of the state lifted voice against it. The acquiescence was universal." (Citing the Gelpke case.)

Douglas v. *County*, 101 U. S. 686, speaking to an earlier decision, says: Other objections to its constitutional validity than those which had formerly been considered were raised, argued and decided in favor of the law. From that time forward and until long after the issue of the bonds in question, the law was treated by the courts and the people as valid and constitutional. No lawyer, asked for a professional opinion on that subject, could have hesitated to say that it had been settled.

Important that the general understanding of the legal profession throughout the country is believed to have been that they were valid. *Township* v. *Talcott*, 86 U. S. at 678.

It is important that conditions show the understanding of the bar and bench at the time of the later decision. *Havemeyer* v. *County*, 70 U. S. 303.

It has been held controlling that in earlier times and decisions no intimation was given by any department of the government that certain statutes were otherwise

than legal in their character. *Havemeyer* v. *County*, 70 U. S. 303—that no doubt as to validity had been expressed though the question had often been considered.

Douglas v. *County*, 101 U. S. at 679, 680, 681.

Validity of sales had not been brought into question in any of the tribunals of the state until long after the contract in question was made. *Rowan* v. *Runnels*, 46 U. S. 139.

Importance is attached to how, at the time the contract was made, the law as to that subject was expounded by all the departments of the government of the state and administered in its courts of justice. *Ohio Life Company* v. *DeBolt*, 57 U. S. 432.

Important it is that an interpretation was acted on as undisputed for any great lapse of time, and the construction the law received from the authorities of the state at the time when the contract was made. *Ohio Life Company* v. *DeBolt*, 57 U. S., 427.

A construction uniform and unquestioned by all the departments of the government for a long period of time must be regarded as the true one. *Ohio Co.* v. *DeBolt*, 57 U. S. at 431.

PART 2-H.

These plaintiffs in error are within said exception and have suffered a change in decision and judicial construction of statute such as entitles them to federal review.

There has not been any overruling by name of any case holding that such as the Fleming contract is a valid contract. But surely there is in the instant case a reversal of basic reasoning, rules and principles which, if followed to the logical conclusion, hold such contract to be enforcible.

The third contract was executed January 17, 1911. The Baker case was decided April 9, 1910. It said:

And where the will, as in this case, provided that the surviving testator should hold the same for life, and as such survivor the husband probated the same and enjoyed the benefits arising therefrom, he took simply a life estate, and a remarriage did not reinvest him with a heritable estate, in which his widow by the subsequent marriage could acquire a dower interest. (147 Iowa, 50.)

Again (62):

By Code Section 3376, it is provided that the right of a widow's share shall not be affected by any will of the husband. But it must be remembered that unless the husband has at some time during the marriage relation held a heritable estate of some kind—legal or equitable—in the property in question, no right of dower could attach thereto in the wife's favor. The stream cannot rise higher than its source. *Dunham* v. *Osborn*, 1 Paige (N. Y.) 634; *Pritts* v. *Ritchey*, 29 Pa.; *Appel* v. *Appel*, 38 Tenn. 348; *Edwards* v. *Bibb*, 54 Ala. 475; *Sullivan* v. *Sullivan*, 139 Iowa, 679.

Baker v. *Syfritt*, 147 Iowa, 49, undoubtedly construes Code Sec. 3376 and 3157 and No. 3154. It seems to be grounded on the thoughts:

1. That although a joint will creating a survivorship as between the makers, husband and wife, is revocable by the survivor, he takes nothing under it;

2. Is nevertheless valid as a contract, creating a trust if the survivor takes under it, and does not attempt to revoke it;

3. That remaindermen or beneficiaries of both testators will take to the exclusion of a surviving spouse of the survivor by a second marriage; on the broad ground that the effect of the will *operating as a contract* was that no estate of inheritance passed to the surviving husband, and that hence

4. The second wife surviving such husband, can take nothing since his estate if surviving contractor was not an estate of inheritance.

5. The husband and wife are put upon the same plane as any other contracting parties.

Caruth's case, 128 Iowa, at 123, filed April 6, 1905, holds:

The inchoate interest of one in the realty of the other ripens into a fee only by death. Not until the life of the owner has departed can it be material whether the interest of either husband or wife in the property of the other has been divested, and then only to determine upon whom the descent is cast, or to whom distribution shall be made. This statute, in declaring that the interest of the one in property of the other cannot be the subject of contract between them, in effect, directs distribution regardless of any such contract, and, as said, is a statute regulating the descent and distribution of property.

Samson v. *Samson*, 67 Iowa, 253, decided Oct. 22, 1885, holds flatly that while Sec. 2436 Code of 1873 gives to the surviving widow a distributive share in the personal property of which her husband *dies siezed*, that during his life time she has no inchoate right in such property, and he may make such disposition of it during his life time as he sees fit. If he sells it or makes any other disposition of it by which he is divested of the ownership, the wife has no claim upon it after his death. The law has placed no restriction or limitation on the power of the husband to make such disposition of his personal property during his life time as he may elect.

Such cases as *Haines* v. *Harris*, 33 Iowa, 516, decided Feb. 24, 1871, under the same statute, and *Stahl* v. *Brown*, 72 Iowa, 720, decided March 5, 1887, hold expressly that the personal estate vests in the administrator during administration. "The heirs take no title to or ownership of

the personal property of the estate while it is subject to administration; but it descends to the administrator upon his appointment."

Vosberg v. *Mallory*, 155 Iowa, 165, on page 174, cites at length from the Samson case, *supra*, approves it and adopts the rule above quoted.

PART 2-I.

While, of course, a flat overruling of earlier decisions raises the Federal question, it is not essential that such overruling be done in terms, and not flatly.

In the Muhlker case the Supreme Court notices that the court below held that, "the decisions in the elevated railroad case are not in point; that there no attempt was made by the State to improve the street for the benefit of the public,"—and says that this is urged with increased assurance on the argument that it is the real ground of decision in the Court of Appeals. It replies:

"However, we need not go further than the present case demands. When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation." (528) And this is the ground of our decision.

Further—

"And when there is a diversity of state decisions, the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the elevated railroad cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different, or that the plaintiff might have balanced the chances of commercial advantage between

the right to have the street remain open and the expectation that it would remain so, is too intangible to estimate.

We certainly can estimate the difference between a building with full access of light and air and one with those elements impaired or polluted."

"We are not called upon to discuss the power or the limitations upon the power of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract, and have come under the protection of the constitution.

And we determine for ourselves the existence and extent of such contract." (528)

The state court did no flat overruling of earlier decisions, it but indulged in a flat repudiation of essential principles and rules formulated by the earlier decisions.

The conclusion that there has been such recession from earlier decisions as to raise a Federal question has been reached on many lines.

The recession had been found on arguing what the later decision did hold.

In *German Bank* v. *County*, 128 U. S. 526, 9 Supreme Court Reporter, 163, it is held that although a statute did not declare bonds of a certain kind to be void, it's declaration that such bonds were not valid or binding until certain conditions precedent had been complied with was an imperative and peremptory declaration that they were invalid until such conditions had been complied with.

PART 2-J.

It is not controlling that the earlier and the changing case differ in respect to subject-matter or differ in some other respect.

In *Douglas* v. *County*, 101 U. S. 680, the earlier case is held to control, although it is said to be "quite true that

the precise objection which has since been raised was not then argued or considered, since the alleged discrepancy between the Act and the Constitution was just as apparent then as it is now."

In that case it is found not to be controlling that the bonds involved in an earlier case were not for the same purpose as the ones passed on in the changing case, where the law construed made provision for the issue of either of such class of bonds. And the same case holds it is not against the binding effect of an earlier decision that the language construed in it was not the identical language or the identical statute construed in the earlier case, if it was similar language found in another statute.

It holds that it does not work against the controlling effect of the earlier decision that objections other than those made in the changing case were in the earlier cases raised, argued, and decided in favor of the law.

In the Copenhaver case, 54 Fed. 664, the earlier case unlike the changing one, did not involve municipal bonds, but involved the State law taxing banks.

In the Anderson case, 116 U. S. 356, 6 Supreme Court Reporter, 415, it is held not to be controlling that the earlier case was not in every respect analogous to the one then in consideration by the court, where both cases involved action upon the same law principle.

In *Ohio Company* v. *DeBolt*, 16 How. 416, there is approved the declaration of the Supreme Court in the Rohan case, where Chief Justice Taney said for the court:

"It is true the language of the court is confined to contracts with citizens of other states, because it was a case of that description which was then before the court. But the principle applies with equal force to all contracts within its juridiction."

It is enough that the earlier case substantially decides what the later case repudiates. *Douglas* v. *County*, 101 U. S. 680, 681, U. S. Anderson's case, 116 U. S. 356, 6 Supreme Court, 416, 417. Or that the earlier decision in effect rules what the later reverses. It is not controlling that the earlier case deals with a statute having provisions. (Gelpke's case 68 U. S. at 203), that are merely similar.

PART 2-K.

What it all comes to is that a set of principles judicially declared may not be recanted in such manner as to have a retroactive effect upon rights accrued while those principles stood unrevoked.

In the Gelpcke case 68 U. S. 205, 206, the Supreme Court says:

"The same principle applies where there is a change of judicial decision as applies to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case."

What is involved in cases like Gelpcke is neither a square overruling nor a former adjudication, or the like. It is a holding that if it is ascertainable from analysis that a certain law principle has been declared, that principle will be applied in all subsequent litigation. For illustration, if the fair effect of an earlier decision is the declaration of a rule that certain things are valid or certain objections are bad, then whatever results from the fact that those things are valid or those objections are bad is available to any litigant.

In the Gelpcke case the opinion discloses the ultimate question to be "a question of power of a city to issue bonds for the purpose stated." Note the question is not whether some particular decision had been made in favor of the power nor whether a decision is attempting to reverse an earlier one which held certain bonds to be valid, nor whether the litigant at bar should prevail. The inquiry is whether a law rule or law principle declaring in favor of such power has been established. The litigant may have whatsoever in logic results from the evolution of that rule or principle. The inquiry is not limited to whether the same litigant has suffered from conflicting lines of decision. The true inquiry is whether his rights have been impaired because a later decision has receded from a principle which prevailed before such recession.

The Anderson case, 116 U. S. 356, 6 Sup. Ct. Rep. 417, bases itself on a "principle" that a legislature has power, if no vested right is interferred with, to enact retrospective statutes validating invalid contracts or to ratify and confirm any act it might lawfully have authorized in the first instance. It speaks (415) of a Missouri decision as being one that did no more than "Give effect to principles announced by the state court prior to the issuing of the bonds."

The Wade case, 174 U. S. 499, 19 Sup. Ct. Rep. at 718, says:

"Such contracts and bonds have been held to be valid upon the principle that the holders upon purchasing the bonds or parties to such contracts were entitled to rely on the prior decisions as settling the law of the state."

In the dissent of Bartlett, J., in the Muhlker case (66 N. E. 562, 563) whose views were adopted by the Supreme Court, he speaks of a desire to record himself against a change from earlier decisions which change "adopts a prin-

ciple that is at war with the long line of decisions in the elevated railroad cases." He says that while the earlier case "does not present facts similar to the one at bar, yet the principle involved is precisely the same"—that principle being that municipalities could not under the guise of exercising the power to alter the grade of a street appropriate a part of the street, practically to the exclusive use of a railroad company, and cut off abutting owners, and without compensation, from using any part of it in the accustomed way. He speaks of the holding of one of the cases that departed from earlier decisions as a holding that the principles of law relating to the change of grade of streets when lawfully made were applicable here, and that the doctrine involved in the earlier decisions had no application.

In the Muhlker case the court speaks of the holdings of earlier New York cases as setting forth an illustrative set of principles which the instant case has repudiated.

PART 2-L.

The federal question may be raised by the repudiation of a doctrine when such repudiation works retroactively.

In Braun's case, 66 Fed. at 479, 480, there is spoken of as established what is termed to be a doctrine, to-wit: that gravel road bonds of the character considered do not create a general obligation of the county upon which an action may be maintained for mere failures to pay them at maturity, but only an obligation payable out of assessments of benefits when collected.

In the case of Copenhaver, 54 Fed. at 664, the exception to the general rule concerning the following of state decisions is spoken of as doctrine established, and established on precedents cited.

The Olcott case, 83 U. S. at 693, says that before certain county orders in suit were issued the state courts made expositions of the law applicable, and asserted the doctrine that aiding the building of a railroad was a matter of public concern, and was in such sense a public use as that though built by private corporations there existed the public right of eminent domain in their aid, and the power to tax in their aid.

What is involved is not the decision of a controversy between named parties or a judgment *in rem* fixing *status* against all the world. Neither identity of party or of issue are involved. Nor are we concerned with cases where between the parties it is determined, say, that the first of a series of bonds is valid, and that therefore all the others in the series are. As to none of the foregoing, is there invoked the rule of Federal review that we are dealing with, for in all of those illustrations rights are finally determined by *res judicata* or by the doctrine of estoppel by litigation.

The rule of Federal practice we invoke concedes that those earlier decisions are not *res judicata* as to any except those who are parties or privies, but that such earlier settlement of law rule or doctrine is available to all the world as a basis for objecting to a reversal of those law rules or precedents.

PART 2-M.

The Gelpcke and like cases do not involve former adjudication. They merely announce the law doctrine that reversals in judicial decision, while they may be prospective, may not be retroactive.

What the Supreme Court of the United States has affirmed was not that an adjudication between parties must stand but that:

"The sound and true rule is that if the contract when made was valid by the laws of the state as then expounded by all departments of the government and administered in its courts of justice, its validity and obligation can not be impaired by any subsequent act of legislation or decision of its courts, altering the construction of the law."

In support it cites *Ohio Life Co.* v. *DeBolt*, 16 How. 432 a case which had nothing to do with either Gelpke or his bonds.

In the Gelpke case certain earlier decisions are referred to as settling a certain law rule as to the validity of a certain class of bonds. The bonds attacked in the Gelpke case and as to which the Iowa court reversed its earlier decisions affirming the validity of the bonds, were not bonds in issue in the earlier cases, nor was Gelpke a party or privy to the earlier cases. What the Gelpke case therefore affirms is not the standing of the Gelpke bonds, but that Gelpke has the protection for his bonds of a law rule made in earlier decisions to which he was not a party and in which other than his bonds were considered, and upon this, that the Supreme Court of the United States would not permit the Gelpke bonds to be invalidated by an abandonment of a law rule made for the benefit of all, though made before Gelpke bought any bonds.

PART 2-N.

In the Gelpcke case, 68 U. S. at 205 the conclusion as to what is settled by the earlier decisions is not reached because of something that is declared in any one or more of the earlier decisions but by a piecing together of what all of them when taken together can be in reason deduced to hold—in other words, if an examination of all the case law at the time the contract was made, reasonably construed, declares such a contract to be valid, a subsequent holding that it is invalid creates a federal question just as much as if the latter decision was in flat conflict with an earlier decision holding in terms that such contracts are valid.

Each of the eight cases considered in the Gelpke case has similarity and dissimilarity. They are alike only in the fact that Gelpcke was not a party to them and that his bonds were not involved in them. They are respectively *Dubuque County* v. *R. R.*, 4 Greene, 2, wherein it is held:

The constitution does not deny power to vote a tax in aid of railroads on the ground that a statute giving that power delegates the power to legislate; the case declares that such vote involves no act that has the slightest approximation towards such legislation; that it neither creates nor repeals any law; that voting such aid is not affected by the limitation upon state indebtedness and that it might with equal propriety be said that the citizens of the state could not in the aggregate go in debt beyond $100,000.

State v. *Bissel*, 4 Greene, at 332, is merely an affirmance of the case just commented upon.

Platt v. *County*, 5 Iowa, 151, is in effect, another affirmance of that case. It holds it has heretofore been determined in Iowa and is therefore not now an open question that the legislature has given counties authority to subscribe in aid of a railway company.

Ring v. *County*, 6 Iowa, 265, did not have the power to issue bonds for its main question. That main question was whether the bonds in controversy had been duly and formally executed as required by law. But in the course of decision it was found necessary to say:

"As the power of a county to issue bonds in the payment of subscription to the capital stock of a railway exists by virtue of the general law of the land, such power need not be set forth in the declaration in an action upon the bonds."

Speaking of the Platt case, supra, the Ring case says that counsel do not appear to look for a re-examination of that case and, "since the decision of the former cause the court has seen no occasion for a change in its views and the subject will not be again discussed in the present case."

In *McMillen* v. *Boyles*, 6 Iowa, 304, the holding is that because of the decision of two other cases cited, and because of many decisions concurred in by all the judges that have occupied the bench, there has been definitely and fully settled (not the rights of given parties or the dealing with certain contracts or certain rights) but a proposition that the constitution authorized the county to subscribe to stock in railroads and issue their bonds in payment therefor.

In *McMillen* v. *County Judge*, 6 Iowa, 390, there is the same situation, and reference to still other cases. What is ruled is again not a concrete adjudication but the abstract proposition that having been recognized at different times by a majority of the court, it may be regarded as settled that counties may make such stock subscriptions.

In *Games* v. *Robb*, 8 Iowa, at 199, the "first" question was said to be whether a county judge had power to issue bonds and subscribe for railroad stock and it is said:

"The first question we understand to be settled in favor of the power, by the cases of Clapp, Ring, McMillen and the cases there referred to."

These made the settled law on which the Gelpke case acted a set of pieces.

In the Douglass case, 101 U. S. at 685, it is said that after the decision of *Bassett* v. *Mayor* and *State* v. *Binder*, and considering the circumstances that attended these decisions and with the mind of the court having been directed by counsel in argument to the registration laws, the legislature might fairly assume it to have been judicially determined that assent of two-thirds of the qualified voters voting was the legal equivalent of the assent of two-thirds of all the qualified voters residing in an election precinct.

All of which fairly sums to the proposition that it is not essential that any one earlier case affirm the validity of the contract or the right to enforce contractual relations—that it suffices that a rule has been made, and the holding is that such rule can not be reversed by subsequent decisions, so far as dealing with the past is concerned, that it suffices if a principle sought to be violated in the later case can be deduced from ten earlier cases, each contributing a part, element by element, for the ultimate conclusion that the contract was valid when made.

A declaration that there was a conflict with earlier decisions has been based on finding that the earlier ones were one link in a chain; that they settled some one rule or principle which if followed to its logicial end, made it improper to defeat the litigant in the later case, when he would not have been defeated had the earlier rule been followed to such end—Olcott's case, 83 U. S. at 693.

In *German Bank* v. *County*, 128 U. S. 526, 9 Sup. Ct. Rep. 164, such a conclusion is reached by ruling against

a contention made in the later case that the report of the earlier fails to show that certain questions in issue in the later case had been presented in the earlier one.

PART 2-O.

A recession may be worked out by indulging in inferential analysis including analysis of the arguments—by finding it to be Stare Decisis what the earlier law or decision was in effect and substance, and what the changing decision is in these regards.

The Muhlker case, 197 U. S. 544, 25 Sup. Ct. Rep. 525, declares that it itself rests upon the case of *Story* v. *Elevated Railway*, (N. Y.) 43 Am. Reps., 146, and upon *Lahr* v. *Elevated Railway Co.*, (N. Y.) 10 N. E., 528, which cases are known as the elevated railroad cases decided in 1882. It declares as to the Lahr case that in it the doctrine of the Story case was declared to be *Stare Decisis*, not only upon all the questions involved, but upon all that came logically within the principles decided. (Enumerating them).

The Muhlker case reaches its conclusion by noting from cases in New Jersey and elsewhere, affirming that those cases clearly express the right of abutting owners to light and air.

In a word, it is an assertion of *stare decisis*, pure and simple. It is not pretended that the other cases adjudicated the suit the Supreme Court is deciding, nor that exactly the same rights are involved, nor that the parties were the same. It is simply a declaration that when on analysis of decisions it is found to be a rule of law that one may not be unduly interferred with in the easement of light and air, and the highest court of a state has once so said, it cannot negative that result in the case of other

parties who have suffered an impairment in such easement after the first decision affirming the right was made.

A recession has been found by indulging in inferential analysis—say by holding that what is fairly to be implied is as much a part of the contract as that which the words expressed. (Citing Gelpcke's case and *City* v. *U. S.*, 103 Fed. 420).

Breyman v. *Railway*, 85 Fed., 583.

In the Gelpcke case it is said:

"The earliest of these cases was decided in 1853, the latest in 1859. The bonds were issued and put upon the market between the periods named. These adjudications cover the entire ground of this controversy. They exhaust the argument upon the subject. We could add nothing to what they contain. We shall be governed by them unless there be something which takes the case out of the established rule of this court upon that subject."

The Supreme Court does not proceed to settle a concrete controversy, but to evolve a doctrine or rule of law from the fact that in the earlier decisions certain objections were made urging that the constitution of the state did not permit a statute authorizing the issuance of bonds in aid of a railroad.

The court reached the decision that the Gelpcke bonds were valid, not because their validity had been affirmed in earlier decisions but because three enumerated objections were made and overruled, which objections asserted that the issuance of bonds of the Gelpcke kind was not authorized by the state constitution. It is not claimed by the Supreme Court that the overruling of these objections in a case to which Gelpcke was not a party nor his bonds involved, compelled the upholding of the Gelpcke bonds. What it does do is to declare that since these objections had been repeatedly overruled by the Supreme Court of Iowa,

therefore the validity of the authorizing statute had been settled and that, for that reason, Gelpcke could not be affected by any reversal of the earlier ruling which held said objections on the score of constitutionality to be untenable.

In the Douglas case, 101 U. S. 684, 685, the like reasoning is indulged in and the same result effected, and this, though—that while,

"It is true the bonds voted at this election were not to be used in payment of subscriptions to the stock of the railroad companies, the rule construed was the one in which provision was made for such subscriptions."

Further—the Douglas case bases itself in part by following *State* v. *Binder*, 58 Mo., 450, of which it says that "similar language in another statute was construed." It bases itself in part on *Basset* v. *Mayor*, because that case establishes the doctrine that an election of a certain kind has been by the sum of the decisions held to be "the mode contemplated by the legislature as well as by the law for ascertaining the sense of the legal voters upon the questions submitted, and that there could not well be any other practicable way in which such a matter could be determined."

The Lewis case (N. Y.) 56 N. E. 548, declares that in reaching its conclusion as to the existence of said easements, it has been materially aided by certain other decisions.

In the Muhlker case, the declaration that certain things were settled by earlier cases is supported by the statement that, "The true relation and subordination of these rights, public and private, is expressed not only by the Elevated Railway cases, but by other cases collected in Vol. 1, Lewis' Eminent Domain, wherein it is said, that "the existence of these rights or easements of light, air and access as appurtenant to abutting lots are as much property as the lots themselves, is established beyond question."

In the Lewis case, 56 N. E. 548, it is declared the court has been materially aided in reaching its conclusion that an easement existed as to light, air and access, by opinions delivered in certain other cases, although it did not adopt all of the grounds upon which these other decisions proceeded to judgment.

In the Olcott case, 83 U. S. pp. 689, 690, 695, 696, 697, 698, it is ruled that a railroad is such public use as that it may be aided by taxation. With this as a premise, the next step was the declaring that there had been a recession from earlier cases because the case at bar held this class of bonds in aid of a railroad to be invalid, though the earlier cases had sustained bonds of that class, pp. 691, 692, 693.

PART 2-P.

As construction of the statute by the highest court becomes part of the statute law a change in such construction which operates retroactively on contract rights is as vicious as legislation that so acts.

The construction of a statute by the highest court of a state becomes a part of the statute and therefore a change in the construction of it by means of a judicial decision of such nature as to impair the obligation of a contract would violate a familiar provision of the Federal Constitution.

Braun's case, 66 Fed. at 479, 480.

This pronouncement is approved in Anderson's case, 116 U. S. 356, 6 Sup. Ct. Rep. 416 (which cites among others *City* v. *Lamson*, 9 Wall. at 485; Taylor's case, 105 U. S. 71; Thompson, 3 Wall. 330; Brown's case, 63 N. Y. 244; Colley Constitutional Limitations, 4th Ed., 474, 477; Dillon Municipal corp., Sec. 46.)

Such construction is regarded as a part of the statute and is as binding upon the courts of the United States as the text. Morley's case, 146 U. S. 162, 13 Sup. Ct. Rep. at 56 (citing Leffiingwell's case, 2 Black at 603)—*State* v. *Ry.*, 3 Fed. at 888.

The construction put upon a state statute by the highest court of a state becomes a part of the statute and can no more be disregarded by the courts of the United States than it could be if it had been originally incorporated into the text of the statute.

Braun's case, 66 Federal at 479, 480.

After a statute has been settled by judicial construction the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purpose the same in its effect on contracts as is an amendment of law by means of legislative enactment. Gelpke's case, 1 Wall. 175; Havemeyer's case, 3 Wall. 294; Thompson's case, 3 Wall. 327; Lee's case, 7 Wall. 181; *Chicago* v. *Sheldon*, 9 Wall. 50; Olcott's case, 16 Wall. 678 (main case); Fairfield's case, 100 U. S. 47; *Louisiana* v. *Pilsbury*, 105 U. S. 278; *Douglas* v. *Pike*, 110 U. S. at 687; Bank case, 128 U. S. 526, 9 Sup. Ct. Rep. 163, 164.

The rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights than would be given to legislative amendment; that is to say, the change can be prospective but not retroactive.

Douglas case, 101 U. S. 687.

The validity and obligation of a contract can not be impaired by any subsequent act of legislation or decision of its courts.

Ohio Co. v. *DeBolt*, 57 U. S. at 432.

In *Township* v. *Talcott*, it is said:

"In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation."

In Loeb's case, 179 U. S. 472, 21 Sup. Ct. Rep. at 182, that the rights and obligations of parties accruing under settled decisions of courts of the state would not be affected by a different course of judicial decisions subsequently rendered, any more than by subsequent legislation.

In Havemeyer's case, 70 U. S. at 303, that no subsequent action by the legislature or judiciary can impair the obligation.

PART 2-Q.

While a change in legislation tending to impair contract rights, of course, raises a federal question, one may be raised as well by a change in the construction of statutes if such change in such construction tends to impair contract rights.

This position is sustained by the overwhelming weight of authority.

The Aetna Life Co. case, 138 U. S. 67, 11 Sup. Ct. Rep. 215, speaks of what is not followed as being "the unsettled character of the decisions" in the highest court of the state.

In *Myrick* v. *Heard*, 31 Fed. 243, it is said:

That while the Federal Courts will follow the latest settled adjudications they can not as is said in the Gelpke case and in Greene's case, U. S. 3 Sup. Ct. Rep. 69, "follow oscillations in the process of settlement," and in *Opelika* v. *City*, 280 Fed 161, the Gelpke case is cited with approval for the proposition that "it cannot be expected that this court will follow every such oscillation from whatever cause arising that may possibly occur."

In *Douglas* v. *City*, 101 U. S. 686, 687, there is an approval of Rowan's case, 5 How., 134, and the following statement:

"But where different constructions have been given to the same statute at different times, we have never felt ourselves bound to follow the latest decisions if there be contract rights which have accrued under earlier rulings will be injuriously affected."

So far as this case is concerned we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper.

In Olcott's case, 83 U. S. at 690, it is said:

"This court has always ruled that if a contract when made was valid under the Constitution and laws of a state, as they had been previously expounded by its judicial tribunals and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by this court as establishing its invalidity. (Citing among others the Gelpke case.) Such a rule is based upon the highest principles of justice. Parties have a right to contract and they do contract, in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule."

It is said in Braun's case, 66 Fed. at 479, 480:

"Where a state statute has been construed by the courts of the state and parties have acted upon that construction, and have entered into contracts upon the faith of it, the courts of the United States will refuse to follow later adjudications which change the former construction, whenever the rights of either of the contracting parties would be injuriously affected by so doing."

In the Wade case, 174 U. S. 499, 19 Sup. Ct. Rep. at 718, it is said:

"An exception has been admitted to this rule where upon the faith of the state decisions affirming the validity of contracts made or bonds issued under a certain statute, other contracts have been made or bonds issued under the same statute before the prior cases were overruled."

PART 2-R.

Express congressional legislation has made a federal question where the state court has made a change "in the rule of law or construction of a statute."

The Act amending Sec. 237, Jud. Code, approved Feb. 17, 1922, provides:

"In any . involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a state applicable to such contract would be repugnant to the constitution of the United States, the Supreme Court shall, upon writ of error" re-examine, etc. * * * If said claim is made in the highest state court by a stated time.

This is a new rule of Federal review. It is one that Congress has power to make. If the Federal Courts can make a rule that they will entertain jurisdiction where the State Court has changed from earlier decisions, Congress can make a rule that the Federal Court shall take cognizance when the State Court has given a new interpretation to an old statute. It is competent for it to say there shall be review by writ of error in cases that do not present a naked change of decision, and that there shall be such review if there has been a change in the construction of a statute, or a rule of law (whether that rule of law is a statute or something other than a statute.)

Surely, there has been a change in the construction of the joint tenancy statute.

Wood v. *Logue*, 167 Iowa, at 440, declares what the meaning of a certain statute is, and what the attitude of the state and its courts toward that statute. The decision was made after the Fleming contracts were. But the statute dealt with was enacted many years before those contracts were entered into. And the decision, no matter when made, is a binding declaration that the statute

always meant what the Logue case says it does. That is to say, the law assumes that the Flemings read the statute as the Logue case interprets it. The declaration is:

"That an estate of joint tenancy may exist in this jurisdiction does not appear to be denied by counsel, and, indeed could not well be. Estates of joint tenancy were well know at common law, and, though they have fallen into quite general disuse, are not entirely obsolete. Our Code, Section 2923, which provides that conveyance to two or more persons in their own right creates a tenancy in common, unless a contrary intent is expressed, is a reversal of the effect of such conveyance at common law; the rule there being that under a deed to two or more, no other intent being indicated, the grantees take as joint tenants, and not as tenants in common. The qualifying words in the statute cited, 'unless a contrary intent is expressed,' would seem, therefore, to leave place in the law of the state for a joint tenancy, with its characteristic incident of survivorship, if the intent of the parties to the instrument to create it is clearly indicated by the language employed."

Surely, the decision at bar changes the foregoing construction of said statute.

2-R-A.

Whether there has been a change in "a rule of law" depends on the definition of that term. My position is that while every law rule is not a statute, every statute is a rule of law—and that the term includes both written and unwritten law.

To have the force of "law," a rule must possess the quality of uniformity and universality and must operate upon all inhabitants of the entire political community affected by it, alike.

Words and Phrases, Vol. 3, page 34.

Law is the general body of rules addressed by the governing power to and obeyed by the members of the society. Bouvier, Vol. 2, 144; Austin Jr. (Campbell's Ed. 86)—

The aggregate of those rules and principles of conduct promulgated by legislative authority or established by local custom. *State* v. *Lumber Co.* (S. C.) 123 S. E. 504, 508,

Law is a rule of civil conduct prescribed by the supreme power in a state.

1 Steph. Com. 25—Encyc. Brit.
1 Bla. Com. 44.
Leavenworth County Com'rs v. *Miller*, 7 Kan., 479, 501.
1 Kent Comm. 447.
State v. *Fry*, 4 Mo., 120, 189.
Baldwin v. *City*, 99 Penn., 164, 170.
State v. *Denny* (Ind.) 21 N. E. 252, 254.
Cooley Cons. Limitations 90.
Davis v. *Ballard* (Ky.) (1 J. J. Marsh 563, 576.)
Ingersoll's case (Tenn.) 119 Am. St. Rep. 1003.
Henry's case, (R. I.) 73 Atl. 97.
Merchants Exch. v. *Knott*, (Mo.) 111 S. W., 565, 571.
O'Donoghue, 63 Ky. 478, 480.

It includes rules of civil conduct prescribed by the law-making power commanding what is right or prohibiting what is wrong.

Rudd's case (Tenn.) 39 Am. Dec. 189.
Appeal of Locke (Penn.) 13 Am. Rep. 716.

In *Duncan* v. *Magette*, 25 Tex., 245 253, it is said that law is a mass of principles classified, reduced to order and put in the shape of rules agreed on by ascertaining the common consent of mankind.

In Vol. 2, Bouvier's Law. Dict. p. 938, the author says on citation of Blackstone and English cases and text books, that a general principle of law is one recog-

nized by authority and it is called a rule because in new cases it is a rule for decision. On page 145 he adds that in a stricter sense, but still in the abstract, law denotes the aggregate of those rules and principles of conduct which the governing power in a community recognizes as those which it will enforce or sanction and according to which it will regulate, limit or protect the conduct of the members of the community.

Many statutes are classed under one of the divisions above mentioned, because they have merely modified or extended portions of it, while others have created altogether new rules.

Rapalje's and Lawrence's Law Dict., Vol. 2, 731.

"The laws of a state," observes Mr. Justice Story, "are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws." 16 Pet. 18. Hence, he argues, "in the ordinary use of language it will hardly be contended that the decisions of courts constitute laws." In the Civil Code of Louisiana they are defined to be "the solemn expression of the legislative will." See 145 U. S. 454.

In an article by Sir Frederick Pollock in 8th Harvard Law Review, 188, he contends that "it is not possible to make any clear-cut division of the subject matter of legal rules." 2 Bouvier's Law Dict., 146, says that "law may be taken for every purpose save that of strictly philosophical inquiry, to be the sum of rules administered by courts of justice." The author adds, there are principles of law which rest in custom and the adjudications of courts. (Vol. 2, p. 145.)

A statute is a declaration of the legislature that a given pronouncement is the law. Lane's case (Mont.) 13 Pac. 136, 139.

A statute, says Bishop, in Sec. 291 of Criminal Law, "is simply a fresh particle of legal matter dropped into the previously existing ocean of law." See *State* v. *Rechnitz*, (Mont.) 52 Pac. 264.

Many statutes have no form of a command or prohibition. 2 Bouvier's Law Dict., 145, 146.

2 Bouvier's Law Dictionary, 1032, says that a declaratory statute is one which is passed in order to put an end to a doubt as to what is the common law or the meaning of another statute, and which declares what it is and ever has been—and tnat such a statute does not necessarily take away the common law.

Their sources, in the sense of the causes to which they owe their existence as rules, are thus classified: (1) usage which becomes law at the moment at which it receives the imprimatur of the state; (2) religion, the influence of which cannot be left out of account in studying the development of any secular system of law; (3) adjudication, whatever theory be accepted as to its nature as a source of law; (4) scientific discussion; (5) equity, as particularly exemplified in the administration of law by the Roman praetor and the English chancellor; (6) legislation, whether by the supreme power of the state or by subordinate authorities exercising a delegated function. Holland, Jr., Ch. 5.

But, as has already been said, "law" in the abstract involves much more. Thus, a reference in a statute to "the cases provided by law," includes not only those cases provided by former statutes, but also those contemplated by the common or unwritten law. 18 N. Y. 115.

While the word law is not always used as synonomous with statute, in the broader sense law includes both statutory and common law. Fitzpatrick's case, (Minn.) 90 N. W. 358.

In the common use of those for whom those laws are made, law includes the whole body or system of conduct including the decisions of courts as well as legislative acts. *Miller* v. *Dunn* (Cal.) 14 Pac. 27, 29.

The term includes not only written expressions of governing will, but also other rules of property and conduct in which the supreme power exhibits and according to which it exerts its governmental force. Phelps case, 1 Wash. Ter., 518, 523.

The written law is the statute law. The unwritten law is the common law. 1 Steph. Com., 40, following Blackstone.

That part of the law derived from legislation is called statute law. Rapalje's Law Dict., 731—is the written will of the legislature and such law is used to designate the written law in contradistinction to the unwritten law. 2, Bouvier's Law Dict., 1031.

The state has in general two, and only two, articulate organs for law-making purposes; the legislature and the tribunals. The first makes new law; the second attests and confirms old law, though under cover of doing so it introduces many new principles. Holland, Jur. 65; 2 Bouvier's Law Dict., p. 145.

2, Rapalje's Law Dict., 731, states that in a narrower sense law signifies a rule of law especially one of statutory origin and hence in its narrowest sense law is equivalent to statute. The author continues that with reference to its origin law is derived either from judicial precedents, from legislation, or from custom.

The term, law, includes decisions of courts as well as legislative acts. *Miller* v. *Dunn*, 14 Pac., 27.

2, Bouvier's Law Dict., page 145, says that statute law is a fruit of the conscious power of society, but the unwritten and customary law is the product of its unconscious effort—and that statute law should limit itself to aiding and supplementing the unconscious development of unwritten law.

The law of the land, an expression used in Magna Charta, and as adopted in most of the earlier constitutions, means, however, something more than the legislative will; it requires the due and orderly proceeding of justice according to the established methods. See 8 Gray, 329.

2, Bouvier's Law Dict, 145, says that no one statute nor all statutes constitute the law of the state; the principles laid down by the courts and the regulations of municipal bodies as well as to some extent the universal principle of ethics, go to make up the body of the law—and (146), to make the definition more narrow would exclude a large body of what is unquestionably law.

The term "law" as used in the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law, embraces all legal and equitable rules defining human rights and duties and providing for their enforcement, not only as between man and man, but also between the state and its citizens. *Jenkins* v. *Ballantyre*, 30 Pac., 760, 8 Utah, 245.

Regulations prescribed by the Secretary of Agriculture for the inspection, disposition, etc., of cattle, sheep, etc., and the carcasses of meat food products of cattle, sheep, etc., not inconsistent with Act. Cong. June 30, 1906, c. 3913, 34 Stat. 674, authorizing such regulations, have the force of "law," *State* v. *Peet*, 68 Atl., 661, 663, (R. I.).

Law is a rule, not a transient sudden order from a superior, but something permanent, uniform and universal. In re Opinion, (N. H.) 33 Atl. 1076, 1078.

There is a distinction, says Blackstone, between a contract and a law and a law is called a rule to distinguish it from a contract or agreement. Landon, 11 Con. 251, 266. it is conceded judicial decisions are but real evidence of what the law is. Therefore, decisions are not the law in the sense that statutes are. Nor do they make unalterable law. *Paul* v. *Davis*, 100 Ind., 422.

2 Bouvier at 147, says that much of obscurity involving the origin of law and the mutual relations of customs and of statute law is caused by ambiguous uses of the term "source of law," employed to indicate among other things the mode by which authorities have formulated rules which have acquired the force of law.

Law is a rule of action. Blackstone. It is a general rule of action prescribed by the supreme power in the state. Pope's case, 50 Tenn., 682, 701; *People* v. *Quant.* (N. Y.) 12 How. Prac. 83, 84. It imports a rule of action. Baldwin's case, 99 Penn. 164, 170.

PART 2-S.

In this case plaintiffs in error are not confronted with what is in strictness a construction of the state statutes but rather by an interpretation of the general law.

In Olcott's case, 83, U. S. at 690, it is said:

It is not decided that the legislature had not general legislative power; or that it might not impose or authorize the imposition of taxes for any public use. Now, whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has as much reference to the constitution of any other state as it has to

the State of Wisconsin. Its solution must be sought not in the decisions of any single state tribunal, but in general principles common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which like questions of commercial law no state court can conclusively determine for us. This consideration alone satisfies our minds that while *Whiting* v. *Fon due Lac County*, undoubtedly is entitled to great respect, this consideration alone satisfies us that the Wisconsin case in consideration furnishes no rule which should control us.

Determining what are the uses for which general taxation is permitted, and particularly whether the construction and maintenance of a railroad owned by a corporation is a matter of public concern is not one of interpretation or construction of local statutes or constitutions. Olcott's case 83 U. S., at 689, 690.

In *Hartford Co.* v. *Ry.*, 70 Fed., 201, it is held that whether or not a lease by a railroad company of a part of its right of way, with a provision exempting it from liability from any damage to buildings or personal property situated thereon, resulting from the negligence of its officers or agents, or from fire communicated from its locomotive is against public policy, is a question of general law in regard to which the Federal Court while regarding the state decisions as persuasive authority must in the end exercise independent judgment.

Where a question involved in the construction of state statutes practically affects those remedies of creditors which are protected by the Constitution, this court will exercise its own judgment on the meaning of the statutes, irrespective of the decisions of the state courts, and if it deems these decisions wrong will not follow them, and this, whether the case come here from the Circuit Court in ordinary course or from the Supreme Court of the State under the 25th section of the Judiciary act. *Butz* v. *City of Muscatine*, 75 U. S., 575.

Whether the repeal of so much of a municipal ordinance granting trackage rights in a city street to a railway company as relates to double tracks was presumptively a reasonable exercise of the police power or a legislative impairment of the contract ordinance, is a question which the Federal Supreme Court, on writ of error to a state court, must decide for itself, independently of the decision of the state court. *Grand Trunk Western Railway Company* v. *City of South Bend, et al.*, 33 Supreme Court Reporter, 303.

Of course, it is settled that the Federal Courts will, as a rule, follow the Constructions of a State Statute given by the highest court of the state. But this rule is not followed in every case, as for example, it was not followed in *Gelpke* v. *City of Dubuque*, 1 Wall. 175.

Webb v. *Southern Ry. Co.*, 235 Fed. at 590.

(And see Haskell, 289 Fed., 205-6; Lane, 151 Fed., 276; Davis, 104 S. W. 573; Black, Jud. Prec. 541.)

PART 2-T.

This case falls within the rule which will give these plaintiffs in error the right to independent review here where at the time the assailed contract was made there was no decision or statute invalidating such contract.

Even if there be no decision at the time of the action, it is the duty of the Supreme Court to determine upon its independent judgment what was the law of the state when the rights of the parties accrued. Anderson's case 116 U. S. 356, 6 Sup. Ct. Rep. 416, and see Burgess' case, 107 U. S. 33.

To like effect is *Jones* v. *Hotel Company*, 86 Fed., 373 (citing the Burgess case, 107 U. S. at 33). *Pleasant Twp.* v. *Co.*, 138 U. S. 67, 11 Sup. Ct. Rep., 215. *Louisville Co.* v. *City*, 76 Fed., 296 and 47 U. S., 36, 47.

At the time when these contracts were made the Gelpke case, decided in the Federal Supreme Court, was the law in Iowa with reference to contract impairment. It was the law in that jurisdiction, if for no other reason than that it was the reversal of a decision by the Supreme Court of Iowa, and therefore the final decision in the premises. It is true, of course, that the Gelpke case did not rule that a contract like the Fleming contract was valid. But at the time these contracts were made there was also in existence the decision in the Maybury case, 40 U. S. 20—and that case did hold that where there was a contract with any aspect of survivorship there never was a time when dower attached. We do not claim that the existence of these two decisions at the time the Fleming contract was made took away the power to make such a decision as we are now complaining of, and admit that if such a decision had been made by the Supreme Court of Iowa before the Fleming contracts were made, that decision, and not the said two Federal decisions, would govern. But what we do claim is that until such an Iowa decision came it was a case of no decision in Iowa, and that this contract having been made while there was no decision, it can not now be impaired by the decision at bar which, of course, was not entered until after the contracts had been made and had been acted upon for years.

PART 2-U.

The Federal question is adequately and properly raised.

Before this cause left the Supreme Court of Iowa finally these plaintiffs in error fully raised the Federal questions by presenting that the changes made by the court in the construction of statute and of decisions antedating

the contracts at bar, the court violated the rights defendants (now plaintiffs in error) had under Article One, Section Ten, of the Constitution of the United States, and were deprived of property without due process of law in violation of Section One of the Fourteenth Amendment. And the attention of the court was called to the case of Muhlker, 197 U. S., 544, (Tr. 78, 79, 80) (Second Petition for Rehearing, a to e, inclusive, Tr. 84, 85).

It is further submitted that the Federal questions raised had such consideration by the Supreme Court of Iowa as that it may now be entertained were there no other ground for entertaining it. See *Kentucky Union* v. *Kentucky*, 219 U. S., 140, *Illinois Central Railway* v. *Kentucky*, 218 U. S., 551; *Sullivan* v. *Texas*, 207 U. S., 416; *Grannis* v. *Ordean*, 234 U. S., 385. The place where this consideration was given is. (Tr. 130)

All of which is respectfully submitted.

B. I. SALINGER,
Attorney for Plaintiffs in Error.

Albert B. Cummins
of counsel

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 175.

ROBERT J. FLEMING, JOHN A. FLEMING, STANHOPE FLEMING, ET AL., ETC., PLAINTIFFS IN ERROR,

vs.

ANNA B. FLEMING, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

J. M. PARSONS,
Attorney for Defendant in Error.

EARL C. MILLS,
Of Counsel.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

This cause was originally commenced in the District Court of Polk County, Iowa, in Equity, to determine the interest of Anna B. Fleming in the estate of her deceased husband and to have the Court declare that notwithstanding certain contracts, the deceased left an estate in the properties of Fleming Bros., composed of the plaintiffs in error and deceased. That

Court decided for the plaintiff herein, in 1917. An appeal was taken to the Supreme Court by the defendants therein, plaintiffs in error, and was affirmed December 16th, 1919. A petition for rehearing was filed February 5th, 1920, and overruled December 20th, 1920. A second petition for rehearing was filed February 17th, 1921, and overruled September 28th, 1921, and a third petition filed November 25th, 1921, and overruled April 23d, 1922.

A writ of error was taken to the Supreme Court of Iowa, on a petition filed December 16th, 1922.

Points and Authorities.

1. In the Brief and Argument of the counsel on appeal in the Supreme Court of Iowa, no alleged error or any point claiming any Federal question was presented in the statement of facts or in the brief and argument of appellants therein, and thereby any such question was waived.

Sub. Div. 5, Rule 53, Rules of Supreme Court of Iowa.
Lamkin v. Lamkin, 177 Iowa, 584-99.
Dodge v. Grain Shippers, 176 Iowa, 316.

2. Prior to the Rule of the Court, Subdivision 5, Rule 53, the law in Iowa was to the same effect.

Hintrager v. Hennessy, 46 Iowa, 600.
Tubessing v. Ottumwa, 68 Iowa, 691-4.

3. To the same effect is the rule generally.

Henderson v. Huey, 45 Ala., 275.
Grogan v. Ruckle, 1 Cal. 193.
U. P. Ry. Co. v Colorado Postal Telegraph Co., 30 Col. 133.
Hine v. Cloney, 9 Ill. App. 190.

Mauer v. Board of Commissions, 36 N. E. 1101 Ind.
State v. Coulter, 40 Kans. 673—20 Pac. 525.
Succession of Broom, 14 La. Ann. 67.
Phipp v. Mo. Pac., 196 Mo. 321.
Powell v. Nev. C. & O. Ry., 28 Nev. 305.
McDonnell v. Carson, 95 N. C. 377.

4. A Federal question first set out in a petition for rehearing after the judgment of the trial court is affirmed will not support a writ of error by the Federal Supreme Court where the question was not passed on.

St. L. & S. F. Ry. Co. v. Shepherd, 240 U. S. 240.
Waters Pierce Oil Co. v. Texas, 212 U. S. 112.
Boone v. Scott, 233 U. S. 658.

5. The mere overruling of the petition for rehearnig where the questions have been presented for the first time in the petition for rehearing does not give jurisdiction to the Federal Court.

Consolidated Turnpike Co. v. Norfolk & O. V. R. R. Co., 228 U. S. 326.
Forbes v. State Council, 216 U. S. 396.

6. The decisions of a State court on a question of fact is conclusive.

Spencer v. Merchant, 125 U. S. 345, 353.
Eastern Bldg. & L. Asso. v. Ebaugh, 185 U. S. 114.
Egan v. Hart, 165 U. S. 188.
Western U. Teleg. Co. v. Call Pub. Co., 181 U. S. 92.
E. Bement & Sons v. National Harrow Co., 186 U. S. 83.
Baldwin v. Kansas, 129 U. S. 52.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226.
Thayer v. Spratt, 189 U. S. 346.
Avery v. Popper, 179 U. S. 305.
Lent v. Tillson, 140 U. S. 316.
Corry v. Campbell, 154 U. S. 629.
Kelly v. Pittsburgh, 104 U. S. 78.
Kennard v. Louisiana, 92 U. S. 480.
State R. Tax Cases, 92 U. S. 575.
Davidson v. New Orleans, 96 U. S. 97.
Kirtland v. Hotchkiss, 100 U. S. 491.
Missouri v. Lewis (Bowman v. Lewis), 101 U. S. 22.
German Nat. Bank v. Kimball, 103 U. S. 732.

7. The right of presentation of a Federal question having been waived before the Supreme Court of Iowa, and as to all such rights the time to take a writ of error having elapsed, and as to that the decree being final, the plaintiffs in error cannot now raise such questions.

8. The Federal questions raised in this cause are so obviously lacking in asserting any Federal right that the writ should be dismissed.

9. The only right the plaintiffs in error could possibly claim to raise a Federal question is under the Act of February 17th, 1922, amendatory to Section 237 of the Judicial Code, an act passed after all right to raise a Federal question had elapsed, and as to this case the said act is not effective for that purpose.

10. The decision by the Supreme Court of Iowa, was of such matters as that the Federal question did not arise.

11. The State Court held this, that the contracts in question were against public policy and were made for an im-

proper purpose, *i. e.*, to deprive the plaintiff in the suit of her rights as widow.

12. Such contracts as the contracts in question had never been held valid for the purpose claimed by defendant in error by the Supreme Court of Iowa.

13. The contracts in question were held by the Iowa Court to be testamentary in character and, hence not a bar to plaintiff's rights as widow.

14. The whole record of this case shows that the writ of error was taken for delay and hence the same should be dismissed or the decision of the Supreme Court of Iowa affirmed.

15. In construing a statute, it is always construed to be prospective and not retrospective, unless it is absolutely necessary to do so.

Lewis v. Southerland, Statutory Construction Volume 2, Sec. 642, Page 1157.

S. W. Coal Co. v. McBride, 185 U. S., 499.

16. Where exceptions have not been properly saved at the trial, an Act subsequently passed dispensing with the necessity of taking exceptions does not avail.

Liebold v. Kane, 85 Minn. 90.

17. The overruling of the second petition for rehearing, September 8, 1921, was a final judgment within the meaning of the Act of February 17, 1922, as to there being a Federal question in the case, and hence that Act, passed five months after the decision, would not control by its terms.

18. The same is true as to the overruling of the first petition for rehearing, December 20, 1920.

ARGUMENT.

This case was brought by Anna B. Fleming, the widow of Charles Fleming, in equity, in the District Court of Iowa in and for Polk County, on the 2nd day of March, 1918. She set up in her action the marriage with Charles Fleming, the fact that he left no last will and testament; that she was married on the 2nd day of January, 1881, and that she and the deceased lived together as husband and wife until his death on the 15th day of January, 1916. That John A. Fleming was appointed administrator of the estate when she learned for the first time that the Fleming Bros. claimed to own all of the property of the deceased except the exempt household goods of an estimated value of $500.00. That certain real estate stood in the name of the deceased husband—the Fleming Building in the City of Des Moines and other real estate as a part of the assets of the Fleming Bros., Incorporated. That he owned 2,500 shares of stock therein at the time of his death. That John A. Fleming as administrator had filed a report as such setting forth that the deceased owned no property and claiming that it was all owned by the defendants, the plaintiffs in error here, by reason of certain contracts which are set out as copies to the petition in equity and set out herein in the printed record, pages 4 to 7. She set up that the contracts were null and void in so far as they affected her rights as the surviving widow of Chas. Fleming, deceased, for the reason that they were without consideration and contrary to public policy and because they operate as a fraud upon the plaintiff and her rights as the widow of deceased, and that her husband died seized of an undivided one-fourth interest in all of the property of the Fleming

Brothers, as a partnership, which partnership property includes all of the capital stock of the Fleming Brothers, Incorporated, and alleged that the contracts were testamentary in character and purported to do or accomplish in themselves what could not be accomplished even by will, under the statutes of the State of Iowa, and were of no binding force or effect upon the plaintiff, and were not made in good faith and were for the purpose of defeating her rights as widow. That they were concealed from her and were not made known to her until after the death of her husband, and asking for a decree construing the contracts to have no binding force or effect upon this plaintiff, and decreeing that Charles Fleming died intestate; and that the property held by the defendants be declared to be held in trust for her and that the amount of her interest as the surviving widow of Charles Fleming be fixed and determined, and that she be decreed a proper amount for her support during the year following the death of Charles Fleming, and for general relief.

A trial was had upon this petition and the answer and the evidence thereto and the trial judge filed a written opinion set out on pages 51 to 62 of the printed transcript. The Court in such opinion held that whatever was the intent and purpose of the first two agreements, the last agreement is determinative of the rights of the parties involved, as that was the agreement in force at the death of Charles Fleming. That in the absence of an agreement as to the interest of each brother, partner in the partnership, in the property of the partnership the law presumes it to be equal and upon that presumption, if not as the result of agreement.

He held further in said opinion, page 59 of the printed transcript, that whatever title and interest Charles Fleming

had in the property held and owned by the four brothers did not pass from him until death. As a means of divesting title the last agreement is not effectual until the death of Charles Fleming. Furthermore, the agreement by its terms did not operate as an agreement *in præsenti* but as a conveyance only upon the death of one of the brothers. The instrument itself and the acts of the parties under the instrument do not reveal an intent to convey an estate or interest that should vest immediately, but on the contrary, one that should pass only upon death, and held further, on page 60 of the printed transcript:

> "I conclude and hold that under the agreements, of which the last is the one under which the property is held that the decendent had an interest in the property of Fleming Bros. not disposed of prior to his decease, but disposed of at his death under the agreement, which disposition is testamentary in character but void for that purpose."

He held further that the agreement was void as against public policy in so far as it affected the rights of the widow.

The decree of the Court was signed by Judge De Graff following the opinion of Judge Dudley, Judge Dudley being dead at the time the matter came on for final decree.

So that whatever question may have arisen in this litigation as to the interpretation of the contracts under which the plaintiffs in error claim and the interpretation of which is in question by the writ of error herein, arose upon the filing of the opinion and entry of the decree in the District Court of Iowa. In the appeal to the Supreme Court the appellant's brief and argument so far as the propositions and points are concerned is set out on pages 62 to 66 inclusive of the printed transcript. There are eleven propositions set out and in none

of these propositions is there any statement of any claimed Federal question whatever and hence no claimed Federal question could arise on the decision of the Supreme Court on the appeal so far as that opinion followed the decision of the Court below. The opinion of the Supreme Court was filed December 16th, 1919, and in that decision as one of the grounds thereof the opinion says:

> "Under our law, the wife, the weaker vessel, the one who maintains the home and rears the children, is entitled to have provision made for her, if, peradventure, death robs her of the one legally and morally pledged to support and maintain her. She is entitled to share in such of his estate as by his efforts he accumulates and leaves at his death. The husband cannot take this from her by any testamentary disposition. He cannot contract with her for its release. In view of the legal status of the wife, in view of the relationship which she sustains to her husband, in view of those provisions of statute that protect and guard her interest during his life and after he is dead, it would seem to be against the policy of the law, expressed in the statutes, to permit men to legally get together and agree with each other that, upon their death, their wives and children shall receive no portion of the estate which they spent their lives in accumulating. It is a clear fraud on the marital rights of the wife. Many a wife has been a faithful helper in the building of great fortunes. Many a wife, by economy and self-denial, has been a strong factor in the building. Yet we are asked to say that this wife, who has done faithful service and practiced self-denial for 36 years that something might be left for declining years, must be left penniless. These are some of the features that bring this kind of tenancy into disfavor and show that it cannot be made to defeat a wife's claim under the statute

Again,

> "The result is that the decedent left an estate; and the contract must be deemed to operate as a claim or incumbrance upon it either in part or in its entirety, in the same manner as a contract to make a will. Though, therefore, the contract be deemed enforceable as one to make a will, the question remains: Is it effective as against the widow of the decedent?
>
> "If in the absence of a contract the deceased partner had made a will disposing of his property to his brothers in the manner described by this contract, doubtless it would not be claimed that such will could be effective as against the widow.
>
> "Code, §3376, provides:
>
> "The survivor's share cannot be affected by any will of the spouse, unless consent thereto is given, etc."
>
> "We have held that this section of the statute is applicable to personal property as well as to real estate.
>
> *Ward v. Wolf,* 56 Iowa, 465, 9 N. W. 348;
> *Linton v. Crosby,* 61 Iowa, 401, 16 N. W. 342;
> *May v. Jones,* 87 Iowa, 188; 54 N. W. 231;
> Code, §3362.
>
> The statute therefore is an impediment to the operation of the husband's will upon his estate in such a way as to deprive the widow of her distributive share of either the personalty or the realty."

These opinions, both the original and supplemental opinion of the Supreme Court, as well as the opinion of Judge Dudley, all held the contracts void and inoperative as against the widow for the same reasons.

The opinion goes on and further holds that the arrangement between the brothers was that of a partnership, saying:

"We find, therefore, that a partnership existed between these parties. The provision, therefore, in the contract, that upon the death of any member his interest in the partnership property should pass to his brother partners is an attempt to make a testamentary disposition of the interest of each partner. A fair consideration of all these instruments shows that they were not understood as creating a joint tenancy. It fairly shows that all the brothers understood that they were associated together as partners, and that a partnership existed. An attempt to create survivorship among partners is an attempt to make a testamentary disposition of the dying partner's property or his interest in the partnership property, in favor of the surviving partners, to take effect after his death."

Following this opinion, on February 5th, 1920, the appellants filed a petition for rehearing, which petition for the first time undertook to set up the Federal question claimed here. The brief of the appellee, defendant in error herein, on this petition for rehearing and in resistance thereto, merely set out Sub-division 5 of Rule 53 of the Supreme Court of Iowa, which provides, that,—No alleged error, or point, not contained in the statement of points, shall be raised afterwards, either by reply brief, or in oral or printed argument, or on petition for rehearing. And the opinions of the Supreme Court of Iowa and Supreme Courts of other states holding that the rule meant what it said, also the opinions of the Supreme Court of the United States in the case of *St. L. & S. F. Ry. Co. vs. Shepherd,* 240 U. S. 240, and *Waters Pierce Oil Co. vs. Texas,* 212 U. S. 112.

This petition for rehearing was overruled December 20th, 1920, and in the opinion the court says:

"Personal property, it is true, would be subject to the good-faith indebtedness of the husband; but, as against the widow, it would not be subject to a mere scheme to absorb it. This does not imply that these brothers had a conscious purpose to wrong any surviving widow. Doubtless their only active purpose was to create the enterprise and to draw upon it for the care of all who were dependent upon them either severally or jointly. Though the contract imposed upon them no obligation in respect to any surviving widow, the surviving partners do recognize an obligation either moral or legal to care for the plaintiff as such surviving widow and they offer to provide her generous support. But the specific motive is not controlling. The right of a widow to her share of the estate, whether legal or equitable, owned by her husband at the time of his death, is impregnable; or it is not existent at all. This right does not arise out of any contract. Nor can she be required to accept generosity, however princely, in lieu of it."

And the opinion ends by saying:

"This opinion is supplemental to the original opinion and is not a substitute therefor. One reason therefor is the vigorous attack made upon the original opinion as being in conflict with *Stewart v. Todd*, 173 N. W. 619. The opinion in the latter case and the original opinion herein were both written by the late Justice Gaynor. No reference was made in the original opinion herein to the *Stewart* Case. An examination of that case will readily show how little occasion there was that such reference should be made. The contract in that case was one between husband and wife, and its enforcement was sought and obtained by the surviving husband as against the collateral heirs of his wife. The question whether a contract for his entire estate after death, between the deceased

spouse as grantor and a third party, is subject and inferior to the statutory right of the wife, or husband, was in no manner involved therein. Such is the controlling question in this case. We find no conflict in the two opinions."

A second petition for rehearing was filed on the 17th day of February, 1921, still urging the Federal questions and the same was overruled September 28th, 1921, in no way touching the Federal questions involved or claimed, but only modifying the decree as to some insurance that was involved in the matter, and in the 3d Sub-division of that opinion the Court says:

"The appellants urge upon us very earnestly that the effect of our holding here is to overrule prior decisions, and therefore to deprive appellants of their property without due process of law in alleged violation of the Constitution of the United States. The premise upon which such plea of unconstitutionality is based is negatived by the opinion complained of. It does not purport to overrule prior decisions. Appellants' contention to such effect is argumentative only, and is not sustained by us. Moreover, if the premise were conceded, and if it were deemed correct to say that the overruling of a prior decision by an appellate court of a State is a violation of the Constitution of the United States, such point would have been just as available to the appellants in their original argument as in their petition for rehearing. No such point was therein made.

"We are asked to recognize the point now made as presenting a Federal question. If we could properly do so as a matter of sincere deference to the higher court or as a matter of courtesy to the distinguished counsel, we should not be reluctant to make such

> declaration as would enable a review of our decision by the higher court. But judicial candor compels us to say that we see no Federal question involved. The decree below will be modified as above indicated and otherwise affirmed."

So far, there is no question but what the appellants in error had waived all right they had or ever had to raise a Federal question in this case. This right was waived when they filed their brief and argument and failed to mention the Federal question, and that right was never revived. Also, it seems to us that the right to raise this Federal question never existed and cannot be made to exist for the reason that the opinions of the Supreme Court of Iowa show on their face that they are based upon propositions which do not require the investigation of any Federal question and that they are based upon findings of fact made by the District Court and the Supreme Court and based upon the public policy of the State of Iowa and the laws of the State and that therefore no Federal question could arise.

Act February 17th, 1922.

The only possibility there is in this case, if there is a Federal question involved, of the plaintiffs in error raising that question, depends solely and entirely upon the Act amendatory to Section 237 of the Judicial Code. That statute is as follows:

> "In any suit involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a State applicable to such contract would be repugnant to the Constitution of the United States, the Supreme

> Court shall, upon writ of error, reexamine, reverse, or affirm the final judgment of the highest court of a State in which a decision in the suit could be had, if said claim is made in said court at any time before said final judgment is entered and if the decision is against the claim so made."

This bill was not introduced until after the decision of the Supreme Court on the first petition for rehearing on December 20th, 1920. The Bill went through the regular courses in the Senate and finally passed the House and was approved February 17th, 1922, more than two years and four months after the original opinion had been filed in the Supreme Court of the State of Iowa, and more than three years and six months after the appellants, plaintiffs in error herein, had waived their right to raise any Federal question by filing a brief and argument making no reference thereto.

True, it may be urged that the amendment provides that where there is a suit involving the validity of a contract and it is claimed that a change in the rule of law or construction of statutes by the highest court of a State applicable to such contract would be repugnant to the Constitution of the United States, the Supreme Court shall reexamine, etc. But where the lower court has decided the question squarely in this case and an appeal which in Iowa is *de novo* is taken to the Supreme Court of the State and under the rules of that court all questions not raised are waived, can they now, even with this statute in force raise that question? Are they not by their waiver estopped from raising that question?

The 17th point presents the proposition that the overruling of the second petition for rehearing more than five months before the passage of the Act of February 17, 1922,

renders that Act not applicable. At the time the ruling was made it was right, the question as pointed out had not been properly presented. True, another petition was filed and denied. So they could have kept filing and denying until now. Was not that a final judgment? If not, a judgment is never final as long as one keeps asserting he has the right to set it aside. In other words, must not the claim that a change of rule has been made, be presented properly to the Court? Must not some observance be had to the rules of the Court in which the litigation is pending? Is it sufficient to merely assert it without asserting it in a legal manner?

We contend that when the Court overruled the first petition, December 20, 1920, it was final as to that matter, *i. e.*, the condition of a Federal question. This took place two years and two months before the Act of February 17, 1922, was passed.

The judgment is none the less final, even though a petition to rehear be filed, or a motion to set aside be filed. They are analogous; they each merely suspend, perhaps, enforcement, some remedy or further Act under the judgment. An overruling of either a motion or a petition is, in effect, simply saying to the movant or petitioner, "The judgment entered is, and was at the time of entry, final."

In the dissenting opinion in this case to the first petition for rehearing, it is argued that the decision herein conflicts with *Stewart vs. Todd,* 173 N. W. 619. We think the concluding clause of the majority opinion referred to sufficiently explains *Stewart vs. Todd. Baker vs. Syfritt,* 147 Iowa, 49, is also referred to in the same connection. We see nothing in this case that is in any way analogous to *Baker vs. Syfritt.* In that case, it is true, the Court upheld the disposition of

personal property, but it was an honest disposition and not one made with the view of defeating the rights of the widow, and the actual passing of title came before death.

Wood vs. Logue, 167 Iowa, 436, is also cited in the dissenting opinion.

In the case of *Wood vs. Logue,* there was a demand actually made by the owner of the property, and in the conveyance certain conditions were attached, and certain rights required, and it was held that the property was, of course, subject to the provisions of the conveyance.

An examination of the opinions of the Supreme Court of Iowa, in the other cases cited from Iowa will show that the propositions involved herein in the construction of the contract, modified as it is by the right of the widow to her widow's share, have never before been passed upon by the Supreme Court of Iowa, and the decisions will be searched in vain to discover any fixed, definite, set rule in the State on the matter.

It is our contention that there is no Federal question involved here; that there has been no change in the rules as to the construction of contracts or statutes in the Supreme Court of Iowa. That clearly appears from the opinion of the Supreme Court itself and particularly from the opinion on the last petition for rehearing.

This record, then, presents to the Court this question: Where a party in the State Court has waived all his rights to question on Federal or Constitutional grounds, the decision in the lower courts in presenting, as the plaintiff in error did, their appeal to the Supreme Court of the State without raising any Federal or Constitutional question, can they afterward assert that right? Is it to be conceived that they can

thus play fast and loose with the State Courts, fail to obey the rules of that Court in presenting their questions, become barred as the law then exists, and by a subsequent Act of legislation have these rights revived?

A peculiar situation exists in this case. The case was decided December 16th, 1919. The first petition for rehearing was overruled December 20, 1920. The second petition for rehearing was filed February 17, 1921. On the 17th day of May, 1921, the Bill, Senate File 1831, was introduced into the Senate of the United States for the purpose of amending Section 237 of the Judicial Code as finally amended by the Act of February 17, 1922. This Bill was introduced by Senator Cummins, who appeared in this action for the defendants, and in the progress of the Bill through the House, Mr. Boies, of Iowa, had the Bill in charge, and the proceedings on the passage of this Bill are found in the Congressional Record, pages 1426 and 1427, January 16, 1922, and during these proceedings the following statement was made by Mr. Boies:

> "Mr. Boies. Mr. Speaker, I can say to the gentleman that there is a case pending now in the State of Iowa of considerable importance that has brought to the attention of judges and lawyers the necessity for this amendment."

We place this in the record, as it shows a peculiar state of facts. We do not claim that it really makes any difference in the law as it exists and is, but we do think that it at least calls for a careful scrutiny of the record, and is perhaps an explanation of the repeated filing of petitions for rehearing after the right of appeal had been lost, and that right was

certainly lost, that the overruling at the second petition for rehearing, and it may be the reason why the third petition for rehearing was filed, with no excuse whatever for filing that petition, except that time might be had to procure the passage of the bill.

Rules of the Supreme Court of Iowa.

Rule 53, Subdivision 5, of the Supreme Court of Iowa, set out in the printed transcript of record herein on page 81, is as follows:

> "The errors relied upon for a reversal. Following this the brief shall contain, under a separate heading of each error relied on, separately numbered propositions or points, stated concisely, and without argument or elaboration, together with the authorities relied on in support of them; and in citing cases, the names of parties must be given, with the book and page where reported. When text books are cited the number or date of the edition must be stated, with the number of the volume and the page or section. No alleged error, or point, not contained in this statement of points, shall be raised afterwards, either by reply brief, or in oral or printed argument, or on petition for rehearing."

Respectfully submitted,

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EARL C. MILLS,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1923.

No. 175.

ROBERT J. FLEMING, *et al, Plaintiffs in error.*

vs.

ANNA B. FLEMING, *Defendant in error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

The decision of this court in the case of Tidal Oil Company vs. Flanagan (January 7, 1924), does much to clarify and narrow what is to be submitted to this court in this case. It disposes of the contention made for the defendant in error that there is no jurisdiction here because the Federal question now urged by the

plaintiffs in error was not presented to the Supreme Court of Iowa except in a petition for rehearing. It was, however, presented before final judgment was entered, because that was done on February 17, 1921. (84, 131). And the Flanagan case settles that the presentation was timely because of the provisions of the Act, (42 Stat. 336), approved February 17, 1922. That decision leaves undisturbed the many holdings in this court that the time allowed for perfecting writ of error does not begin to run while a petition for rehearing is pending nor before final judgment. We submit said act applies here. While we grant that statutes are presumed to speak prospectively that does not make said act inapplicable. As it does not except pending litigation, then since it became effective February 17, 1922, and this writ of error was not sued out until December of that year, it does operate prospectively. We think this would be so if the Act had not gone into effect until after this writ had been sued out —but that is moot.

It may well be said in passing that under familiar rules the late raising of the Federal question would not be in our way if said act had not been passed. That rule is that even if the point be first made in a petition for rehearing, that will suffice if the state court gives consideration to the point, other than merely overruling the petition for rehearing. (See Transcript 130).

II.

If the Flanagan decision deals rightly with the Act of February 17, 1922, it eliminates our argument made before the rendition of that decision, that a Federal question is raised by judicial impairment of our contract rights by means of decisions which differ from

those made before those contracts were entered into.

But as we read the Flanagan opinion, it does not depart from the rule that a Federal question is raised when by means of judicial interpretation of a statute, contracts that were valid under an earlier construction are made void by a differing construction, pronounced after the contracts were made.

It is said in the Flanagan decision:

> "In each of them (Muhlker 197 U. S. 544 and Pillsbury 105 U. S. 278, 290) a statute had been passed subsequently to the contract involved and was held to impair it. In such a case this court accepts the meaning put upon the impairing statute by the state court as authoritative, but it is the statute as enforced by the state through its courts which impairs the contract, and not the judgment of the court."

As we view it, this is but a reaffirmation. We think it was always the rule here that where a contract is entered into while a given interpretation of a statute stands, such interpretation is a part of the statute, and that a departure from that construction, made later, is the equivalent of a change in legislation.

We notice the Flanagan case finds some "unguarded language" in some of the earlier decisions including that of Gelpcke, 1st Wall 175, 206. But we fail to find that the criticism is addressed to the following pronouncement of the Gelpcke case:

> "The same principle applies where there is a change of judicial decision as applies to the constitutional power of the legislature to enact the law. To this rule thus enlarged we adhere. It is the law of this court."

Be that as it may, the criticism does not seem to be addressed to Lamson 9 Wall. at 485; Taylor 105 U. S. 71. Nor to Cooley, Const. Lim. (4th Ed.) 474; 477, nor to Dillon, Municipal Corp., 46, nor to the case of Morley, 146 U. S. 162.

The authorities just referred to each and all hold that the construction of a statute by the highest court of a state becomes a part of the statute. That therefore a change in its construction by means of a judicial decision, of such nature as to impair the obligation of a contract, would violate a familiar provision of the Federal constitution. In the Morley case 146 U. S. 162, it is ruled that such construction is regarded as a part of the statute and is as binding upon the courts of the United States as the text.

In Havemeyer's case, 3rd Wall. 294; Thompson case, 3rd Wall 327; Lee's case, 7 Wall. 181; Sheldon's case, 9 Wall 50; Olcott's case, 16 Wall. 678 and still others, it is ruled that after a statute has been settled by judicial construction the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as is an amendment of law by means of legislative enactment. In Ohio vs. DeBolt 57 U. S. at 432, it is said that the validity and obligation of the contract can be impaired by neither subsequent act of legislation or decision of courts.

In the case of Township vs. Talcott, 86 U. S. 678, it is held:

> "In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation.

The Loeb case 179 U. S. 472 rules that the rights and obligations of parties accruing under settled decisions of courts of the state can no more be affected by a different course of judicial decision subsequently rendered than by subsequent legislation."

In the Havemeyer case 70 U. S. at 303 that no subsequent action by either legislature or judiciary can impair the obligation.

In the Olcott case 83 U. S. at 609 it is said:

"This court has always ruled that if a contract when made was valid under the constitution and laws of a state, as these had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature or the judiciary will be ruled by this court as establishing its invalidity * * Parties have a right to contract and they do contract in view of the law as declared to them when their engagements are made."

In the Wade case 174 U. S. 499 it is declared to be controlling that state decisions affirm the validity of contracts made under a certain statute, and that this protects other contracts made under the same statute before the prior construction of them was overruled.

Were it not for one statement presently to be noted, we would feel sure the Flannigan case does not intend to interfere with the rules laid down in the foregoing cases, that it remains the rule that whatever may be true of a naked conflict in decisions, a change in the interpretation of a statute is the same as a change in the statute, where contract rights were acquired under the first interpretation and are going to be lost if the later interpretation rules. If the interpretation is

part of the statute, it would sacrifice substance to technicality to hold that a change in interpretation is not a change in statute.

It is confessed that if a law were passed by using the ordinary methods of legislation and that law in terms sanctioned a survivorship agreement or a joint tenancy, if the same machinery later repealed this statute or declared that such contracts and such tenancy should not be deemed lawful there would be a Federal question.

As the statute first enacted has the judicial interpretation injected into its text, the passing (making) of the law is accomplished not alone by legislative action but by it and said interpretation. The law that is passed is the statute as interpreted by the court of last resort. Nothing can refine that fact away. It is a case of agency. There is nothing in the Constitution that prohibits a state from delegating a vital part of the passing of laws to its court of last resort. The rule that the interpretation is part of the text has been builded upon the fact that the legislative branch has accorded the judicial department the power to say what the statute is. The two departments pass the law. And what is said of the first statute of course is so as to a repealing or amending statute. It is unthinkable that relief against impairment depends on what court finds it, or that it is material that the wrong is done by two arms of the State Government, jointly, rather than by the legislative arm alone. On that theory what becomes of the rule that the construction is part of the text.

We have said that if it were not for one statement in the Flanagan decision, nothing in it creates any difficulty about finding a Federal question. The statement that creates the doubt is an attempted distinction be-

tween review of what is done in a lower Federal court and review on writ of error to the highest state court. The statement is:

> "These cases were not writs of error to the Supreme Court of a state. They were appeals or writs of error to Federal courts where recovery was sought upon municipal or county bonds or some other form of contracts, the validity of which had been sustained by decision of a Supreme Court of a state prior to their execution and had been denied by the same court after their issue or making. In such cases the Federal courts exercising jurisdiction between citizens of different states held themselves free to decide what the state law was and to enforce it as laid down by the state Supreme Court before the contracts were made rather than in later decisions. They did not base this conclusion on Art. 1 Section 10 of the Federal Constitution but on the state law as they determined it, which, in diversity citizenship cases under the 3rd Art. of the Federal Constitution, they were empowered to do."

It may be said in passing that the Muhlker case (perhaps others) was a writ of error to the Court of Appeals of New York. Be that as it may, is the distinction tenable? While the Federal courts may protect against judicial constructions of statutes which work an impairment of contract because diversity of citizenship gives them power to determine, it cannot be the vital thing what court deals with the impairment or what provision of the Constitution authorizes them to act. The vital thing is that an *impairment by statute construction* does raise a Federal question. The Federal courts act on such impairment because diversity of citizenship exists; the highest court of a state may

find the like impairment between citizens of different states, if no removal has been sought, or in a case between citizens of the same state. The Federal courts may not pass on impairment unless there be diversity of citizenship. The state court may pass on it if there be diversity or if there be not. Take the cases of confiscatory public utility rates, and fixing such rates by contract. They are entertained here whether the case comes to a Federal or a State Supreme Court.

Could Congress not legislate against strikes. If yes, could it not effectively direct this court to review action had in some suit arising under such strike law.

The fact remains that when either class of court finds a change in statute interpretation which destroys contracts this raises a Federal question, whether it be one class of court or the other that finds such impairment to exist.

Later, we have to deal with whether the enumeration of the things to which the judicial power shall extend excludes what is not found in the enumeration. Writ of error to a state court is not listed. There is no constitutional provision that authorizes review on such writ. That fact was once the basis of a stout contention that while this court might review the action of the lower Federal tribunals it could not review the action of a state court of last resort. (See Paddleford, 14 Ga., 438; Pierce, 27 Ohio State 155; Martin, 1 Wheat. 304; Hempstead, 6 Conn. at 488.)

The controversy was finally brought to an end because when the mandate of this court was not obeyed by the state court upon claim that this court could not review the action of that court, by the issuance of alternative process here. The controversy developed the rule that every court in the land is in such sense an in-

ferior tribunal as that this court can (if Congress authorizes) review its action. (See Skillern, 6 Cranch. 268; Stewart, 3 How. 425; Martin, 1st Wheat. 304.)

There is on the statute books a provision under which though there be no diversity of citizenship a victim of mob violence may transfer his cause to the Federal courts. Of course this opens the door for such review as Federal court action may have. If Congress could validly enact such a statute (and its validity has never yet been challenged), why does it not have the power to provide that when a claim for such violence reached the highest court of a state its action might be reviewed here by writ of error to that court. Unless the Act of February 17th was intended to effect nothing, it, at least, does for causes like the one at bar what would be effected in the illustration of mob violence.

We submit this position is fortified by the following statement in Flanagan case:

> "There is another class of cases relied on to maintain this writ of error. They are those in which this court has held that in determining whether a state law has impaired a contract, it must decide for itself whether the law as enforced by the state court impairs it. It often happens that a law of the state constitutes part of the contract and to make the constitutional inhibition effective this court must exercise an independent judgment in deciding as to the validity and constitution of the law and the existence and terms of the contract.
>
> "The difference between this class of cases and the present one is that in the present one it is claimed that a state court judgment alone, and without any law, impairs the obligation of a contract."

III.

When these contracts were made there was in force Section 2436 of the Code of Iowa. At that time that section had been construed time and again to mean that while the surviving spouse had a distributive share in the personal property of which the spouse died seized, that during life neither had any interest in the personal property of the other and the other might dispose of it at pleasure. (Original brief 46, 47).

The decision at bar nullifies that interpretation by holding that Charles Fleming could not in his life dispose of his personal property by contract in the nature of a survivorship agreement.

At the time these contracts were made Section 2923 of the Code of 1897 was in force. In the case of Wood vs. Logue 167 Ia. 441, and in other cases (Original brief 25) that statute was construed to permit arrangements in the nature of a joint tenancy with its incident of survivorship.

The decision at bar reverses these interpretations. The effect of the two departures from interpretation of statute works, for all practical purposes, that when the contracts were made the statute permitted their making, and that after they were made and the *status* could not be restored, the statute was changed so as to destroy those contracts.

IV.

We concede that if the case of *Flanagan* deals rightly with the Act of February 17, 1922, we have no rights except such as flow from impairment of contract rights by means of conflicting decisions. We respectfully urge that the court is in error as to what said act effects. Roughly speaking, it provides that where there is a suit involving the validity of a contract and it is

claimed therein that the highest court of a state has made a change in the rule of law or construction of statutes applicable to such contract which it is asserted is repugnant to the constitution of the United States, the Supreme Court shall upon writ of error re-examine, etc., provided that said claim is made by a stated time.

The Flanagan case says as to this:

> "We cannot assume that Congress attempted to give to this court appellate jurisdiction beyond the judicial power accorded to the United States by the constitution. The mere reversal by a state court of its previous decision * * whatever its effect upon contracts, does not * * violate any clause of the Federal constitution. Plaintiffs' claim, therefore, does not raise a substantial Federal question."

We think this is a clear statement; first, that there is no substantial Federal question unless it raises a violation of some clause of the Federal constitution; second, that Congress has no power to direct what shall be reviewed in this court unless something has been done that constitutes such a violation.

We are unable to find any provision in the constitution which creates either of these limitations. We submit that no such limitation has ever before been asserted; that Congress has often directed review as to matters that are not violations of the constitution, and that the regulation has been obeyed without challenge. Probably that may be explained by the fact that Section 2 of Article 3 does not limit the matters to which the judicial power shall extend to cases arising under the constitution but extends that power as well to cases arising under the *laws* of the United States. The obvious result is that if Congress enacts any valid law the constitution provides that cases arising under that

law shall be reviewed here even though no violation of the constitution be involved.

Congress is given the power "to constitute tribunals inferior to the Supreme Court," Article 3, declares that the judicial power of the United States shall be vested not only in the Supreme Court but in such inferior courts as the Congress may from time to time ordain and establish. Clearly, this gives power to regulate appellate procedure in matters disposed of in these inferior courts and obviously permits such regulation although the cause in the inferior court does not involve a violation of the constitution. And the matter does not stop with appellate procedure as to those inferior tribunals. It will be conceded that in many cases a writ of error lies to the court of last resort of a state. This proves that power to regulate appellate procedure is not limited to reviewing the action of inferior Federal tribunals.

We repeat there is nothing in the constitution which stops Congress from commanding appellate review here, even though no violation of the constitution is asserted. To be sure, Section 2 of Article 3 enumerates certain things to which the judicial power shall extend. But it fails to enumerate many things to which that power has always been extended. Writ of error to a state court is not mentioned. In other words, the enumeration has never been treated as speaking in terms of exclusion. The enumeration does not include patent suits except it be for the clause extending the power to all cases arising under the laws of the United States. The fact then that taking property through impairing contract rights by means of judicial decisions is not found in the enumeration in Article 3, is no evidence that Congress might not enact a law prohibiting such impairment, and if it did this, it

would follow it could validly require this court to deal with such impairment.

True, the constitution has a specific command that legislation shall not work such an impairment. That means that Congress could not permit one. But does it also mean that because the constitution limits itself to impairment by legislation that Congress can not prohibit an impairment other than by legislation. At the least, Congress can make an expository law that taking by certain classes of judicial action shall be deemed a taking of property such as is prohibited by the 14th amendment.

We submit Congress has the power to protect against a seizure which though judicial in form, in fact constitutes a taking of property without due process of the law and to declare that judicial impairment violates the Fourteenth Amendment—has the power to regulate appellate procedure in matters that do not involve an infraction of the constitution.

V.

It is, of course, possible that though the attitude that has just been discussed is untenable, that still the ultimate conclusion reached in the Flanagan case is sound. The question still remains what the Act of February 17 *does* do. This has been perceived because the court said:

> "The intention of Congress was not, we think, to add to the general appellate jurisdiction of this court, existing under prior legislation."

This raises no question of the power of Congress but narrows the inquiry to what power Congress has attempted to exercise. We take it, there is a presump-

tion that no Congressional enactment is made idly and without purpose to accomplish anything substantial. The Act directs there shall be review by writ of error if the Federal questions dealt with by the Act are presented by a stated time. What is accomplished by regulating the time for raising a question if after it is raised it must be found there can be no appellate review because there is no Federal question. Why provide the time in which to raise that there has been a change in the rule of law or construction of statutes by the highest court of a state if it be utterly immaterial whether or not there has been such a change. It seems to us that the Act is at least legislative construction, that the change dealt with does raise a Federal question that should be reviewed by writ of error. Whatever doubt there is arises from the fact that the act specifies a change alleged to be repugnant to the constitution. We have already said all we can on that head. Our position as to it is that, at least, Congress has construed such a change to violate the 14th Amendment.

Respectfully submitted,

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